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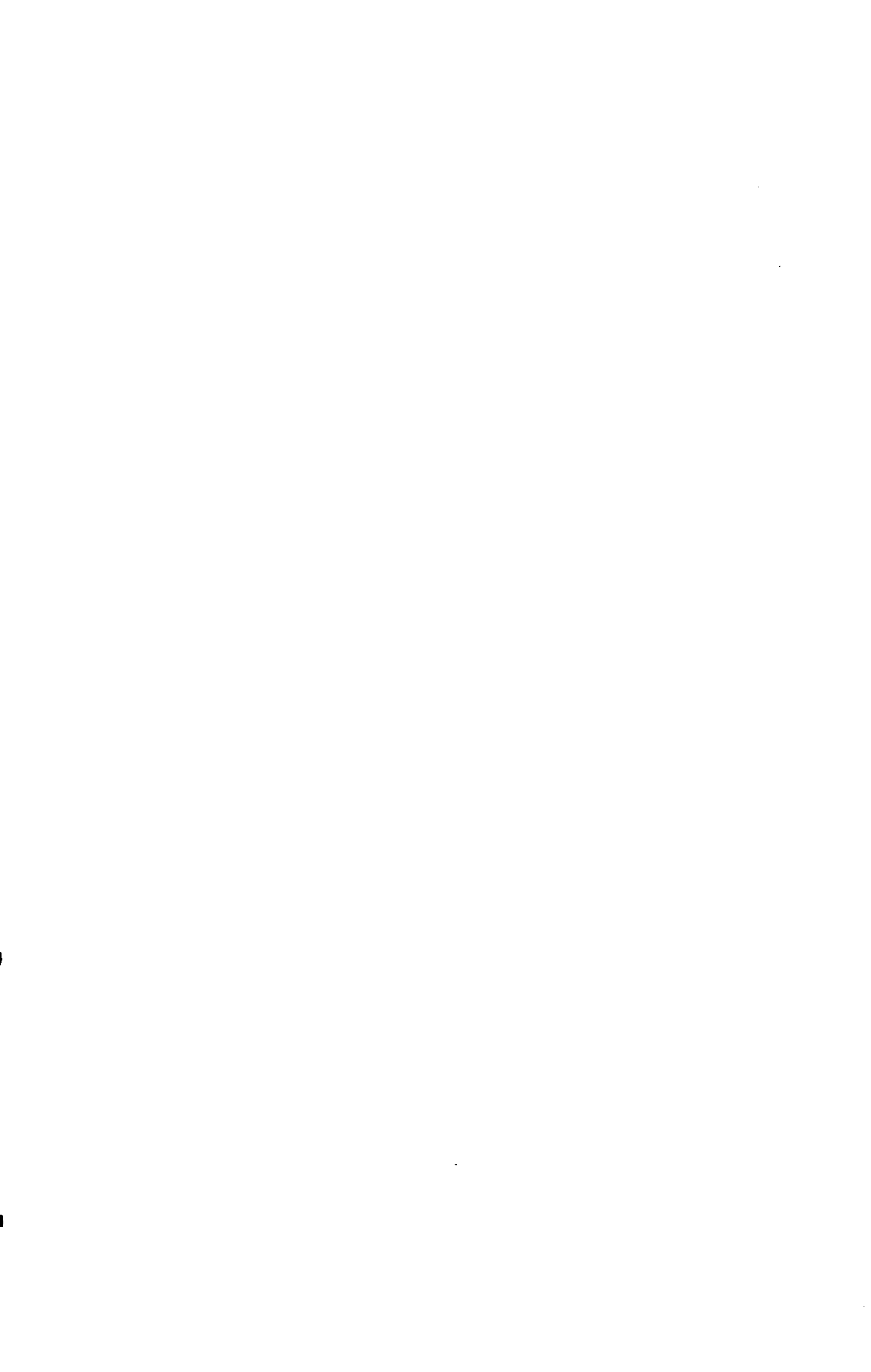
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June 26²

REPORTS OF CASES

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DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

ROBERT G. MORROW

REPORTER

VOLUME 48

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OF THE
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DURING THE TIME OF THESE DECISIONS.

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CASES DECIDED

IN THE

SUPREME COURT

OF

OREGON

Argued 18 January, decided 27 February, 1906.

SAVAGE v. SALEM MILLS CO.

85 Pac. 69.

ACTION FOR LOSS OF WHEAT IN WAREHOUSE—MISJOINDER OF CAUSES.

1. A complaint in which it is alleged that defendant operated a flouring mill having connected therewith a storage house for wheat; that it was the custom of defendant to receive wheat from farmers, to issue receipts therefor, to mix wheat received, and to sell the same or to grind it into flour at its own pleasure; that in delivering wheat and in issuing the receipt the parties contracted with reference to such custom; that plaintiff accordingly delivered to defendant a certain amount of wheat; that defendant sold and disposed of the same and applied the proceeds to its own use; that plaintiff demanded the wheat or the payment of the value thereof, and that defendant refused to give either—contains but a single cause of action for breach of contract, and is not subject to the objection that a cause of action for breach of contract has been joined with a cause of action for conversion.

PAROL EVIDENCE—WRITTEN INSTRUMENT—SILENCE OR AMBIGUITY.

2. Where a receipt is issued by a warehouseman and accepted by the owner of goods stored as containing the terms and conditions upon which the commodity is delivered and received, it becomes a contract between the parties, and cannot be contradicted or varied by parol testimony; but where it is silent as to the terms of the contract, or when its language is ambiguous or uncertain, its terms or its meaning may be shown by parol and it may be interpreted in the light of surrounding circumstances.

CUSTOM AND USAGE AS PART OF CONTRACTS.

3. In the absence of an agreement to the contrary, the usage or custom of a particular business enters into and forms a part of a contract made by a person engaged in that business, and other persons dealing with him with knowledge of that custom, but proof of custom or usage is never admissible to give an interpretation to a contract inconsistent with its language.

(48th Or.—1)

WAREHOUSEMEN—CONCLUSIVENESS OF LOAD CHECKS.

4. A written receipt, commonly called a "load check," given by a proprietor of a wheat storehouse to persons leaving wheat in store, not showing who the wheat was received from, or its grade, or the terms or time of the deposit, and having some terms of doubtful meaning, manifestly is not conclusive as to the agreement concerning the storing of such wheat, so as to require the rejection of parol evidence on that subject.

APPEAL—TRIAL BY COURT—CONCLUSIVENESS OF FINDINGS.

5. Findings of a judge made after a trial without a jury have the force and effect of a verdict, and cannot be disturbed if they are supported by any competent evidence.

DEPOSITS OF WHEAT IN WAREHOUSE—SALES OR BAILMENTS.

6. Where one delivers grain to a keeper of a warehouse and mill under an agreement that either the identical grain or the same amount of a similar kind and quality shall be returned out of the common mass of which it became a part, there is a bailment of such property, and consequently the ownership and risk of loss remain in the depositor. Where, however, property of a comminglable kind is left with a keeper of a warehouse under an agreement that the latter may use it and discharge his obligation to the depositor by paying cash or returning the same amount of the same grade of such property from some other source, such leaving is a sale, and the warehouse keeper is liable for the price of such property, even though the receipt provided for the payment of charges for storage and for the value of sacks used, and excused the warehouseman from liability for damages caused by the elements.

INTEREST AFTER DEMAND.

7. Under a contract for the sale of property to be paid for on demand, interest begins to run from the time such demand is made, under Section 4595, B. & C. Comp., providing for interest on money after it becomes due.

From Marion: GEORGE H. BURNETT, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by George O. Savage against Salem Mills Co. to recover for wheat delivered to the defendant company by plaintiff and his assignors. The complaint contains 11 causes of action, but as they are all substantially the same, it will be necessary to refer to the pleadings only as they affect the first. It is alleged that the defendant is a corporation doing a general milling business; that at all the times mentioned in the complaint, and for many years prior thereto, it had owned and operated a flouring mill, having in conjunction therewith and connected thereto by stationary mechanical wheat conveyors a storage house, to hold and retain wheat received by it until such wheat should be sold or manufactured into flour or other mill products; that it was the custom and usage of the defendant to receive wheat from the farmers, giving load checks therefor,

showing the name of the person from whom received, the date and number of bushels, and thereafter, at the convenience of the parties, to issue a receipt to the holders of such load checks, a copy of which receipt is set out; that it was the custom and usage of the defendant, known and agreed to by parties delivering wheat to it, to mix the wheat received with its consumable stock, and to sell the same or grind it into flour and sell the flour at its pleasure and to retain the proceeds thereof; that the party delivering wheat, by paying $2\frac{1}{2}$ cents per bushel for storage and $3\frac{1}{2}$ cents per bushel for sacks could demand payment for the wheat so delivered in merchantable wheat at any time before the 1st day of July next following the delivery, subject, however, to the defendant's preferred right to purchase, but in case such demand should not be made prior to the date stated, it should be optional with the defendant, either to pay the market price of wheat of the kind and quality delivered at the date of the demand, or deliver an equal quantity of merchantable wheat upon the payment of storage and for sacks; that such custom and usage were known and agreed to by all parties doing business with the defendant, and in delivering wheat and in issuing the receipt mentioned, the parties contracted with reference to such usage and custom, and such receipt was based upon and controlled thereby; that on the — day of August, 1899, the plaintiff delivered to the defendant at its mill 2,092 bushels and 12 pounds of merchantable wheat and received from it the customary load checks therefor; that such wheat was delivered to and accepted by the defendant under and in accordance with such usage and custom and not otherwise, and the same constituted and was the contract in reference thereto; that no part of the wheat so delivered was ever returned to the plaintiff or paid for in money or in kind, except 55 bushels and 12 pounds, paid in mill feed and flour, leaving a balance of 2,037 bushels due the plaintiff; that soon after receiving the wheat defendant sold and disposed of the same and applied the proceeds to its own use; that on August 17, 1901, the plaintiff tendered to defendant the requisite amount for storage and for sacks and demanded the delivery to him of 2,037 bushels of

merchantable wheat or the payment of 50 cents a bushel, the value thereof, but defendant refused to do either. The plaintiff therefore demanded judgment against it for the value of the wheat with interest thereon from the date of the demand.

A demurrer to the complaint on the ground of a misjoinder of causes of action (one in contract and the other in tort) being overruled, the defendant answered, admitting the receipt by it from the plaintiff of 2,092 bushels and 12 pounds of wheat in August, 1899, and that it issued and delivered to its customers load checks and final receipts as set out in the complaint, but denying the other material allegations. For an affirmative defense it averred that for 25 years it had been engaged in the business of receiving grain for hire in store, charging and collecting storage thereon, and issuing checks and receipts therefor as provided by statute; that in such business it had acquired and operated warehouses and equipped them in the manner usual for storing and handling grain; that on September 21, 1899, the plaintiff had in store with it 2,037 bushels of wheat which had been previously deposited by him and received by it upon the terms and conditions and in accordance with the receipts set out in the complaint; that of the wheat so stored by plaintiff, 1,391 bushels and 50 pounds was white wheat No. 1, and 645 bushels and 10 pounds was white wheat No. 2; that on September 22, 1899, the grain then in store with the defendant, including that belonging to the plaintiff, was either consumed or damaged by fire; that at the time of such fire there was deposited with the defendant by 254 storers 122,534 bushels and 54 pounds of wheat of five different grades and values; that of such wheat 17,162 bushels and 22 pounds was not destroyed; the plaintiff's portion thereof being 23 bushels and 16 pounds, which the defendant has on hand. The reply put in issue the material allegations of the answer.

The cause was, by agreement of the parties, tried by the court without the intervention of a jury, and the findings and conclusions of law, omitting those giving the dates and amounts of wheat deposited by plaintiff's assignors, are as follows:

FINDINGS OF FACT.

"(1) At all the dates and times mentioned in the pleadings in this action, the defendant was and now is duly incorporated by and organized under the laws of the State of Oregon, and authorized by its charter to conduct a general milling and manufacturing business, and at all said times and dates was engaged in the business of buying and selling wheat and grinding wheat into flour and other mill products, and doing a general milling business at Salem, Or., at which place was and is situated its principal office and place of business.

(2) At all the dates and times mentioned in the pleadings in this action the defendant, for the purpose of carrying on its business, owned and operated a flouring mill at Salem, Or., by means of which it ground wheat into flour and other mill products, and also for the purposes of its business owned and operated in connection with its said flouring mill two other buildings at Salem, Or., in which were various bins, suitable for and used by the defendant for the purpose of holding and containing wheat. One of said buildings was joined and connected immediately to the said flouring mill, under the same roof, but with a covered passageway between them, into which wagons could be driven for the purpose of unloading wheat into said mill and said building so immediately connected with said flouring mill. The other of said buildings was distant from said flouring mill about 100 feet, but both of said buildings were so connected with said flouring mill by proper appliances, such as conveyors and the like, that wheat could be and was readily conveyed from the bins in said buildings to and into the grinding machinery in said flouring mill, and said flouring mill and two buildings were operated by defendant at all times as one plant or manufacturing establishment.

(3) At all the dates and times mentioned in the pleadings in this action it was the usage, custom and usual course of business between the defendant and all persons delivering wheat to the defendant in said flouring mill and buildings of defendant at Salem, Or., well known to and habitually acted upon by both the defendant and all such persons, for the defendant to issue and deliver to each person delivering wheat to the defendant at Salem, Or., for each wagon load of wheat so delivered a load check having the blanks therein filled according to the number of load check, the date of delivery, the amount in bushels and pounds of wheat delivered, and by and for whom delivered, in blank form as follows:

No.....

S. F. M. Co., Salem,189...

Received from.....bushels

Sacks returned

Sacks returned empty Weigher.

Not transferable.

Which load checks were always signed by some duly authorized agent or employee of defendant, for and on its behalf, and if so desired by such person for the defendant afterward to issue to such person, in lieu of such load checks, a receipt having the blanks filled therein, according to the date and number of issue, for whose account and order, the number of cents per bushel for sacks, and the amount of wheat delivered, in bushels and pounds, in blank form as follows:

No.....

SALEM FLOURING MILLS CO.

Salem, Oregon,189...

Received in store for account of.....
bushels of merchantable wheat, in bulk, subject to.....
order (damage by the elements excepted), on or before the first
day of July next, on payment of two and one-half cents per
bushel storage and.....cents per bushel for sacks, and the
return of this receipt, properly indorsed. The wheat being deliver-
able on boat or cars, sacked. It is understood and agreed that
the Salem Flouring Mills Co. are to have the first refusal of said
wheat.

Bushels.....

Salem Flouring Mills Co.,

Per.....

Such receipts being always signed by the defendant by one of its duly authorized agents.

(4) At all the dates and times mentioned in the pleadings in this action, it was also the usage, custom and usual course of business between the defendant and all persons delivering wheat to the defendant in said flouring mills and buildings of defendant at Salem, Or., well known to and habitually acted upon by both the defendant and all such persons, for the defendant to mix all the wheat so delivered to the defendant with wheat of the defendant in one common mass in the bins in said flouring mills and buildings of the defendant at Salem, Or., the first refusal of such wheat so delivered to defendant being reserved by and conceded to defendant by such persons, and thereafter for the defendant, at its own convenience and pleasure, without

any written authority from such persons, to ship out any of such common mass of wheat in said flouring mill and buildings, or to grind the same, or any part thereof, in its said flouring mill into flour and other mill products, and the same to sell for the account and benefit of the defendant; but at all such times the defendant had merchantable wheat of its own, either in said flouring mill and buildings of defendant at Salem, Or., or at other places in the State of Oregon outside of said Salem, equal in quantity and quality to the wheat of such persons so mixed as aforesaid in such common mass, and ground up or shipped out by the defendant.

(5) Generally in settlement of the claims arising out of the delivery of wheat to the defendant under the customs, usages and the general course of business set forth in the third and fourth findings of fact, the defendant's course of business was to pay by bank check or in money to the person delivering wheat the market value at Salem, Or., on the date of settlement, of merchantable wheat of the quantity delivered, but in some instances, instead of payment by bank check or money, the defendant would, in settlement of such claims, deliver to the owner of such claims merchantable wheat equal in quantity to the wheat theretofore delivered to the defendant, on payment by such owner of $2\frac{1}{2}$ cents per bushel for storage and $3\frac{1}{2}$ cents per bushel for sacks.

(6) During the crop season of the year 1899, and prior to September 22, 1899, the plaintiff, Geo. O. Savage, delivered to the defendant in its flouring mill and buildings aforesaid, at Salem, Or., 2,037 bushels of merchantable wheat, for all of which the defendant then and there delivered to him load checks in the form hereinbefore set out. * *

(16) All the wheat mentioned in the foregoing findings of fact was delivered to the defendant and received and treated by the defendant in pursuance of and according to the usage, custom and regular course of business set forth in the third and fourth findings of fact, and in all the transactions hereinbefore set forth both the defendant and the persons hereinbefore named contracted with reference to and relied upon the said usage, custom and regular course of business.

(17) On September 22, 1899, a fire occurred which, commencing in said flouring mill of defendant, spread and totally consumed said flouring mill and two buildings of the defendant, mentioned and described in the second finding of fact, and all the wheat then in said flouring mill and buildings of the defendant was either destroyed or rendered unmerchantable by reason of the occurrence of said fire.

(18) At the time of said fire there was no lightning or storm in or about the place where said flouring mill and buildings of the defendant were situated, or in or near Salem, Or.

(19) At and prior to the time of said fire the defendant had in its said flouring mill city water from the waterworks supplying the inhabitants of the City of Salem with water, which water was introduced into said flouring mill by means of a 3½-inch standpipe, extending from the basement to the top floor of said flouring mill, and on each floor thereof the defendant kept and maintained a barrel of salt water, together with a hydrant and 50 feet of inch and a half hose, connected with said standpipe. There were also in said flouring mill six Babcock fire extinguishers, and the mill was swept and cleaned thoroughly twice a day, and there were dust collectors on all the machinery in said mill.

(20) On or about August 17, 1901, at Salem, Or., George O. Savage, plaintiff herein, and Lewis Savage, H. C. Fletcher, J. M. Munkers, George G. Ferrell, F. M. Smith, Tilmon Ford and J. O. Estes, being the persons named in findings of fact numbered from 6 to 15, both inclusive, and hereinbefore set forth, each tendered to the defendant in gold and silver coin of the United States 2½ cents per bushel as storage and 3½ cents per bushel for sacks for the several amounts of wheat delivered to the defendant by each of them, and said F. E. Commons, as hereinbefore set forth in said findings of fact numbered from 6 to 15, both inclusive, and each then and there offered to return to the defendant the load checks and receipts issued as aforesaid by the defendant, and each of them then and there demanded of defendant that it deliver to him the several and respective amounts of merchantable wheat so delivered to defendant as aforesaid, or, in case the defendant would not deliver said amounts of merchantable wheat as demanded, that it, the defendant, pay to each of them the reasonable market value thereof on that day at Salem, Or., but the defendant then and there refused, and still refuses to either deliver said amounts of wheat or to pay the market value thereof.

(21) The reasonable market value of merchantable wheat at Salem, Or., on August 17, 1901, was 50 cents per bushel.

(22) After making the tenders and demands set forth and hereinbefore mentioned in the twentieth finding of fact, and prior to the commencement of this action, the following persons named in said twentieth finding of fact, to wit, Lewis Savage, H. C. Fletcher, J. M. Munkers, George G. Ferrell, F. M. Smith, Tilmon Ford and J. O. Estes, each sold, assigned and transferred to the plaintiff, George O. Savage, all of his claim and demand against the defendant on account of the several amounts

of wheat delivered to the defendant by each of them, and said F. E. Commons, as hereinbefore set forth in findings of fact numbered from 6 to 15, both inclusive, and plaintiff has ever since then been, and now is, the owner and holder of each of such claims and demands."

The court finds these conclusions of law:

CONCLUSIONS OF LAW.

"(1) In the transactions mentioned and described in the pleadings in this action, the defendant was not a warehouseman within the meaning and intent of the statutes of the State of Oregon made and provided for the regulation of warehouses and warehousemen.

(2) The legal effect of the transactions described in the foregoing findings of fact, taken in connection with the usage, custom and regular course of business also described in said findings of fact, was and is to vest in the defendant the right and to impose upon it the duty in any view of the pleadings and testimony to fulfill its obligation to any and all of the persons delivering wheat to it as set forth in the foregoing findings of fact, either by paying the market value of merchantable wheat at the time of demand made for same, or by delivering an equal quantity of merchantable wheat to the person or his assignor theretofore delivering wheat to the defendant.

(3) The further legal effect of the transactions described in the foregoing findings of fact, taken in connection with said usage, custom and regular course of business, was to pass the title of wheat so delivered to the defendant as aforesaid from the persons delivering the same to the defendant, and to make those transactions sales, and not bailments, of such wheat.

(4) Even granting that the allegations of the defendant's answer about the fire mentioned in said answer, and in the seventeenth finding of fact, are true as alleged, such allegations are not sufficient to enable the court to determine that the damage resulting from said fire was damage by the elements.

(5) The testimony given at the trial of this action does not prove that the damage to the wheat in said flouring mill and buildings of the defendant at Salem, Or., at the time of said fire, was 'damage by the elements' within the meaning of the phrase 'damage by the elements excepted,' as used in the form of receipt set forth in the third finding of fact.

(6) The precautions taken by the defendant to prevent fire in said flouring mill, as described in the nineteenth finding of fact, constitute, in respect to said flouring mill, at least ordinary care to prevent fire in said mill, but in view of the conclusion

that the title to the wheat in question was vested in the defendant at the time of the said fire, it is not material to form any conclusion in this action about the origin or effect of said fire.

(7) The following objections of the defendant, urged against testimony offered by the plaintiff at the trial of this cause, and reserved by the court for further consideration, should be and the same are each hereby overruled, to wit: * *

(8) The plaintiff is entitled to judgment against the defendant for the sum of \$3,980.54, and for the costs and disbursements of this action."

The defendants excepted to findings 4 and 16, on the ground that they were not supported by the testimony, and moved the court for some additional findings, which motion being overruled, judgment was entered in favor of the plaintiff, in accordance with the findings and conclusions of law. From this judgment the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Sanderson Reed* and *J. H. McNary*, with an oral argument by *Mr. Reed*.

For respondent there was a brief over the names of *Woodson Taylor Slater*, *William Marion Kaiser* and *Tilmon Ford*, with oral arguments by *Mr. Slater* and *Mr. Kaiser*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The defendant contends that the complaint states a cause of action for breach of the contract under which the wheat was delivered by plaintiff and his assignors and received by it, and also for a conversion of such wheat; hence the demurrer to the complaint, or the motion made at the trial to require the plaintiff to elect upon which cause of action he would proceed, should have been sustained. But, as we read the complaint, it states but one cause of action, and that on contract. It sets out in detail the terms of the agreement under which the wheat was delivered and received, and alleges a breach thereof. There is no charge that the wheat was wrongfully or unlawfully converted by the defendant to its own use, but, on the contrary, the allegation is that under the contract the defendant was entitled to use the wheat as part of its consumable stock and to sell or manufacture it into flour at its pleasure, discharging its liability

to the plaintiff and his assignors by either delivering to them other wheat of the same grade and quality, or by paying the market price of such wheat when demanded. A demand and refusal were necessary under the contract in order to fix the defendant's liability, for it was not required to pay for the wheat delivered, either in kind or in money, until requested to do so.

2. It is also urged that all the testimony tending to show the custom, usage and regular course of business of the defendant and persons dealing with it in regard to receiving, handling, disposing of and paying for wheat delivered, was incompetent, because the contract under which the wheat was delivered and received was embodied in a wheat receipt and could not be contradicted or varied by parol. When a receipt is issued by a warehouseman and accepted by the owner of goods stored as containing the terms and conditions upon which the commodity was delivered and received, it becomes the contract between the parties, and cannot be contradicted or varied by parol testimony; but when the receipt is silent as to the terms of the contract, they may be shown by parol, or, when the language of the receipt is ambiguous or uncertain, it must, like any other contract, be interpreted in the light of the surrounding circumstances: *Hirsch v. Salem Mills Co.* 40 Or. 601 (67 Pac. 940, 68 Pac. 733), and authorities cited.

3. And, in the absence of an agreement to the contrary, the usage or custom of a particular business will enter into and form a part of a contract made by a person engaged in such business and those dealing with him with knowledge of such custom and usage (*Morning Star v. Cunningham*, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211), although proof of custom or usage is never admissible to give interpretation to a contract inconsistent with its language: *McCulsky v. Klosterman*, 20 Or. 108 (25 Pac. 366, 10 L. R. A. 785); *Holmes v. Whitaker*, 23 Or. 319 (31 Pac. 705).

4. The receipt which defendant was accustomed to issue to persons delivering wheat to it is ambiguous, uncertain and indefinite on its face. It does not contain the name of the person from whom the wheat was received, nor truly state the quality

of such wheat, nor all terms and conditions upon which it was received. It recites that the wheat was received in store "for the account" of a named person, but not "from" such person as the statute requires: B. & C. Comp. § 4602. It merely relates that the wheat received was merchantable, while the pleadings and evidence show that defendant had received and had on storage at the time of the fire five different kinds and grades of wheat of different values, and that two different grades were received from plaintiff. It does not state that the wheat would be returned or redelivered, but that it would be subject to the order of the person for whose account it was received on or before a certain date upon the payment of charges, and is silent as to the terms of the contract under which it was to be held and disposed of after the time stated. Moreover, the right of the person for whose account it was received is limited and restricted by the provision that the defendant "is to have the first refusal of such wheat." The meaning of this latter clause is doubtful, but was probably intended to give the defendant a preferred right to purchase at all times, and to limit the right of the holder of the receipt to receive grain in return therefor to cases in which the defendant did not care to purchase. It is manifest, therefore, that the load checks and receipts do not alone express the contract. They are but part of the transaction. Their importance is only made apparent upon proof of the custom and usual course of business of the defendant, known and acquiesced in by the depositors, and the purpose for which they were issued. The entire contract between the defendant and the persons delivering wheat to it was not embodied in the written memoranda, and it is not from a consideration of the writings alone that we are to determine the character of the transaction or the respective rights and obligations of the parties. The entire contract must be ascertained from the custom and usage of the business and the general understanding of the parties in connection with such load checks and receipts. The words "in store," used in the receipt, are not controlling as to the nature of the transaction, as appears from the authorities referred to hereafter.

5. A contention is made that some of the findings of fact are erroneous. The findings have the force and effect of a verdict of a jury, and cannot be disturbed if there is any evidence to support them. Without undertaking to refer to the evidence in particular or to recite it in detail, it is sufficient that the record discloses that there was much testimony given and received on the trial to support the findings as made, and they must, therefore, for the purposes of this appeal, be taken as true. Nor do we think the matters upon which additional findings were requested and refused material to the determination of any question arising on this appeal.

6. We come, then, to the merits of the controversy. The facts, as they appear from the pleadings and findings, are that on September 22, 1899, and for many years prior thereto, the defendant had owned and operated a flouring mill at Salem, in this State. Connected with the mill by means of mechanical wheat conveyors were storage houses or bins in which wheat purchased by the defendant to be manufactured into flour and such as it received from the neighboring farmers were mixed and commingled. According to the usual course of its business, when wheat was received from a farmer it was weighed by the defendant's weigher and a load check therefor was delivered to the farmer, showing the date and quantity of wheat delivered, which check could, if desired by the holder, be exchanged for a receipt in the form heretofore alluded to. No such receipt, however, was ever issued to the plaintiff and to but two of his assignors. After the wheat was received and weighed, it was, with the knowledge and by the consent of the farmer, conveyed into the warehouse and mixed and commingled with wheat belonging to the defendant, and thus became a part of the consumable stock of the mill, and thereafter, at its own convenience and pleasure and without further authority from the farmer, the defendant sold and shipped the wheat or ground it into flour or other mill products and disposed of the same for its own account and benefit. The farmer had a right at any time to demand the return of an equal quantity of wheat of like kind with that delivered or the market price of such wheat at the

time of the demand, and the defendant had the right to and generally did settle the transaction by paying the market value of wheat of like quality as that delivered, but in some instances settlements were made by delivering to the holder of the receipt wheat, equal in quality and quantity with that delivered, on payment of a certain sum per bushel for storage and for sacks. On September 22, 1899, the mill and warehouse were, with their contents, either totally destroyed by fire or so damaged as to be worthless. At the time of the fire there was due from the defendant to the farmers, including the plaintiff and his assignors, 122,534 bushels and 54 pounds of wheat, but of this amount only 105,372 bushels and 32 pounds were in the warehouse.

Upon this state of facts, the question for decision is whether the transaction between the plaintiff and his assignors and the defendant constituted a bailment or a sale. If the former, the title remained with the bailors and the loss must fall upon them, but if the latter, the title passed to the defendant at the time of the delivery, and thereafter the grain was held at its risk. It is often difficult to determine whether a particular transaction is a sale or a bailment, and especially so when it involves grain delivered to a person and by him mixed and mingled in a common mass with grain belonging to himself or other parties. If a specific amount of grain is delivered by the owner to be returned, either in its original or in an altered form, when called for, there is of course a plain case of bailment, but, when the grain of different owners is mixed and mingled in a common mass by their consent, a different and more difficult question arises. The original idea of a bailment contemplated the return of the identical article delivered as soon as the purpose of the bailment was accomplished: 2 Kent, Lect. 40; Story, Bailment, §§ 1, 2. But the business of storing, transporting and handling grain has grown to such proportions in recent years as necessarily to have wrought a change or modification in the doctrine requiring the subject of bailment to be returned to the bailor. The delivery to public warehouses or elevators of thousands of bushels of grain for storage and safe-keeping by hundreds of

owners, renders it impracticable, if not impossible, to keep that of the several owners separate so as to return the identical grain delivered, and this is no longer expected or required.

The only separation now called for by law is to keep grain of the same class in bins by itself so the owner may have returned to him grain of the kind and quality delivered, and therefore upon the deposit of grain with a warehouseman to be mixed with the grain of other persons, the depositor becomes the owner of his pro rata share of the entire mass, and the transaction is a bailment, and not a sale: *Brown v. Northcutt*, 14 Or. 529 (13 Pac. 485); *McBee v. Caesar*, 15 Or. 62 (13 Pac. 652); *Hamilton v. Blair*, 23 Or. 64 (31 Pac. 197). But the warehouseman is not authorized to use, sell or dispose of the grain stored with him, or any part thereof, without the consent of the owners. He may, from time to time, take from the common mass, upon the order or at the request of an owner, grain in amount equal to that stored for or by such owner, but he is required always to retain of the grain so stored sufficient to supply the other storers, and cannot use or dispose of any part thereof for his own benefit. He is a mere custodian of the grain, with no right to use it in any way, and herein lies the essential difference between a bailment and a sale. In the one case the title to the property remains in the depositor and the bailee is but a mere custodian, while in the other he may use and treat the grain as his own, the depositor relying upon his personal credit for the value thereof either in kind or in money. Where one delivers grain to another under an agreement that the identical grain or grain of similar kind and quality from the common mass into which it was placed shall be returned, there is a bailment, and the right of property remains in the bailor, but when, either from the express agreement of the parties or from the general course of business, the party receiving the grain has a right to use it in his business and as a part of his consumable stock and is not obliged to return the identical grain nor grain of similar grade and quality from the common mass, but may discharge his obligation to the storer by paying the market price

when demanded, or by returning other grain of the same kind and quality, there is no bailment, but a sale or exchange, and the title of the property and the risk are transferred to him.

To determine who shall bear the risk and enjoy dominion over grain which has been by common consent mixed and mingled with that belonging to other parties, we must therefore have recourse to the nature of the transaction, for the rights and liabilities go according to the legal title. "If the nature of the bargain be such," says Mr. Schouler, "as to make the several proprietors owners in common of the mass, any loss should be borne by them in proportion to their several interests; and such an ownership, we have said, is usually presumed. But if one throws his goods into the common mass, on the understanding that the party receiving them may take from the mass at pleasure and appropriate to himself on the condition that he shall restore other goods of the same sort in their stead—and so, too, in stipulations for pecuniary compensation—the dominion over the property passes to the receiver; and on this principle are some of our grain cases decided; the party owning the elevator or warehouse being treated as a purchaser, and not as a depositor"; 2 Schouler, Pers. Prop. § 46. This is the doctrine applied by this court in *State v. Stockman*, 30 Or. 36 (46 Pac. 851), and finds support in the authorities generally: 3 Am. Law Reg. (N. S.) 321; 6 Am. Law Reg. 455; *Richardson v. Olmstead*, 74 Ill. 213; *Lyon v. Lenon*, 106 Ind. 567 (7 N. E. 311); *Barnes v. McCrea*, 75 Iowa, 267 (39 N. W. 392, 9 Am. St. Rep. 473); *Weiland v. Sunwall*, 63 Minn. 320 (65 N. W. 628); *O'Neal v. Stone*, 79 Mo. App. 279; *Andrews v. Richmond*, 34 Hun, 20; *Chase v. Washburn*, 1 Ohio St. 244 (59 Am. Dec. 623); *Rahilly v. Wilson*, 3 Dillon, 420 (Fed. Cas. No. 11,532); *Insurance Co. v. Randall*, L. R. 3 P. C. 101.

In *Chase v. Washburn*, 1 Ohio St. 244 (59 Am. Dec. 623), which is probably the earliest leading case on the subject, the warehouse receipts were in the following form:

"Milan, Ohio, Nov. 5, 1847.

Received in store from J. C. Washburn (by son) the following articles, to wit:

Thirty bushels of wheat.

H. Chase & Co."

In an action of assumpsit to recover the value of the wheat, Chase offered to show that his warehouse and sufficient wheat therein to cover all the outstanding receipts had been consumed by fire; that the custom of the warehouse was to store the wheat in a common mass and ship the same as occasion required, and, on presentation of a receipt, to pay either the highest market price of grain of like grade and quality or deliver other wheat. The court held that if, when Washburn's wheat was delivered to Chase, it became subject to his disposal either to retain or ship on his own account, the property passed and the risk of loss by accident followed dominion over it; that the transaction would not be a bailment, but the legal effect would be to create a debt which could be discharged by the warehouseman paying in wheat of like grade and amount or in money at the market price at the time of the presentation of the receipt; and that in either case the title to the wheat passed to the warehouseman, and he must bear the loss.

In *O'Neal v. Stone*, 79 Mo. App. 279, Stone owned and operated a flouring mill having in connection therewith an elevator. All wheat purchased to be ground and such as was received by him on deposit was mixed and commingled in the elevator, and the general bulk was drawn upon to supply the mill when in operation. The elevator and contents were destroyed by fire, after which Stone denied all liability under any of the receipts issued by him and outstanding. The wheat receipt stated that the party to whom it was issued had deposited with Stone a certain quantity of wheat of a certain grade and quality, for which he agreed to pay a certain rate per bushel for storage, and to assume all damage by fire, etc. The wheat was to be delivered to the party at the warehouse on demand, less a certain amount for shrinkage, and should Stone at the time of such demand not have the amount of wheat called for of equal grade and amount as that received, then he was to have the privilege of substituting an amount equal in value of a grade next above or below that received, and he was also to have the privilege of buying the wheat at the market price at the time of the demand. The court held the transaction to be a sale and not a bailment

and that the loss must be borne by the warehouseman, adopting the distinction between a sale and a bailment as pointed out by Sir William Jones in his *Law of Bailment*, in this wise: "If the goods delivered are to be returned, although in a changed form, it is a bailment, but if the intention is that either money or goods are to be received in exchange for them, there is a transmutation of property, and the obligation created is a debt and not a bailment": Jones, *Bailments*, § 105. And, in discussing the question, BLAND, P. J., said: "The term 'bailment' implies that the owner of property has placed it in the hands of another who is at some time to redeliver it to the owner in its integrity or in an altered form agreed upon. If, therefore, the person to whom the property is delivered has the option to pay for it in money or in some other property or to restore it, such option is inconsistent with the character of bailment and the transaction is, in law, a sale, regardless of what the parties to the transaction may have called it or thought it to be."

In *Rahilly v. Wilson*, 3 Dillon (Fed. Cas. No. 11,532), a warehouseman issued a receipt in the following form:

"Received in store of P. H. Rahilly, — bushels of No. — wheat.
Geo. Atkinson & Co."

The litigation was between depositors of wheat receiving such receipts and the trustee in bankruptcy of the insolvent firm, and the court, DILLON, C. J., held that "where grain is stored in an elevator warehouse with the understanding, implied from the known and invariable course of business, that it may be sold by the warehouseman, and that when the depositor shall be ready to surrender the receipt of the warehouseman therefor, the latter will give the highest market price or the same amount of grain of like quality, but not the identical grain deposited, nor grain from any specific mass, the transaction is a sale, and not a bailment."

In *Andrews v. Richmond*, 34 Hun, 20, the plaintiff delivered to the defendants, who were millers, wheat and took back a receipt as follows:

"Canandaigua, November 14, 1878.

Received of Harris Andrews 490 bushels of wheat in store.

The same is subject to him or option to take price on or before the first of May next. Richmond & Smith."

The wheat was placed by Richmond & Smith in a bin containing some two or three hundred bushels of the same kind and quality of which they were the owners and from which they were drawing every day for the purpose of grinding, and when they received the wheat from the plaintiff they informed him that they intended to mix it with their own and manufacture it into flour. The mill was burned without the fault of the defendants. During all the time and up to the time of the fire there was more wheat on storage in the bins than was delivered by the plaintiff. After the fire plaintiff informed the defendants that he had elected to sell the wheat to them at the then market price. In an action brought to recover such price, it was held that if the receipt alone was considered, the contract was one of bailment, but if it was agreed verbally, at the time the wheat was delivered, that it might be mixed by the defendants with their own wheat and be ground into flour at their pleasure, the transaction was, in law, a sale, and the title passed to defendants, who became liable to the plaintiff to pay him the market price of the wheat delivered or to return other wheat of the same grade and quality, as plaintiff might elect, and that plaintiff was entitled to recover. In the course of the opinion it is said: "The mere consent of the plaintiff that his wheat might be mixed with the wheat of the defendants of the same kind and quality was not inconsistent with a bailment *simpliciter*. Owners of the same kind of property and of equal value, like cereal grains or wines, may consent that they be mixed together in mass, and each, in law, will retain title to his aliquot part, and may maintain replevin for his share as against a wrongdoer who acquires possession of the same. By force of this rule the owner of grain in store may sell a certain quantity of the same, less than the whole, and pass title thereto, without separating the part so sold from the whole." But "an agreement that the particular article which the owner places in the hands of another may be by him consumed or sold in the course of trade is utterly inconsistent with the principles on which the law of bailment is

founded. The very term 'bailment' implies that the owner of an article has placed it in the hands of another, who is at some time to redeliver the same to the owner. If the owner consents that the person to whom he delivers the thing may consume or destroy it, it is not a bailment, whatever else the transaction may be in the law."

A very interesting and apt case, illustrative of the principles which should govern in the decision of the case at bar, is that of the *Insurance Co. v. Randall*, L. R. 3 P. C. 101. It was an action on a policy of insurance which stipulated that "goods held in trust or on commission must be insured as such, otherwise the policy will not extend to cover them." The plaintiffs were millers in South Australia. According to their custom and course of business, wheat was received by them from farmers to whom such course of business and dealing was known, and, on receipt, shot out of bags, in the presence of the farmer who brought it, into large hutches, where it became mixed with other wheat which had been received in like manner and thus became the common stock of the mill, which, according to the custom of business known to the farmer, was either sold by the plaintiffs or ground in their mill and disposed of for their benefit. On the delivery of the wheat to the plaintiffs they gave the farmers receipts in this form: "Received," etc., "in store." The farmer could at any time demand an equal quantity of grain of like quality and grade as that delivered by him to the plaintiffs, or the market price of an equal quantity, fixing the price as of the day on which he made his demand, and the plaintiffs had the option of delivering wheat of like quantity or paying the market price. The mill and its contents were destroyed by fire, and a claim was made by the plaintiffs to the insurance company for the loss, but the amount being in dispute, an action was brought by them to recover the value of the stock consumed. The plaintiffs declared on the policy, and the defendant pleaded that the wheat taken in storage by the plaintiffs from the farmers was held by them upon trust and therefore not covered by the policy. Issue was joined on the plea and the action tried before the chief justice and a jury. No evidence was adduced

by the defendant, but its counsel applied for a nonsuit on the ground that the evidence showed that the wheat was held in trust and was not the property of the plaintiffs. The chief justice declined to grant a nonsuit, and by consent a verdict was rendered in favor of plaintiffs with leave to the defendant to move for a verdict for it if the court should be of the opinion that the wheat was taken on storage and was in fact held in trust by the plaintiffs. A rule *nisi* was granted, calling on the plaintiffs to show cause why the verdict entered should not be set aside and one rendered for the defendant on the following grounds: First, the grain stored had not been insured by the defendant; and second, the wheat taken on storage by the plaintiffs was held upon trust, and was not within the terms of the policy. Upon argument, the judges being equally divided in opinion, the rule was discharged. From this judgment an appeal was taken to the Privy Council, where the case was affirmed after an elaborate and extensive argument on both sides, on the ground that the transaction between the plaintiffs and the farmers who delivered wheat to them was, in law, a sale, and not a bailment, and that the property of the wheat was so vested in the plaintiffs that they would have been compelled to bear the loss by fire if not indemnified by insurance, and, therefore, could recover from the defendant company.

From these decisions and the principles announced in them, it seems incontrovertible that, under the facts as disclosed by the record, the contract and agreement between the plaintiff and his assignors and the defendant, under which the wheat in question was delivered and received, cannot be construed to be a mere bailment, but it was, in law, a sale or exchange, and the liability for loss by fire was with the defendant. The wheat was not received by defendant to be stored for safe-keeping until called for by the owner, nor was it delivered with the understanding that it or other wheat of the same grade and quality from the common mass was to be returned. By consent of all parties it was mixed with and became a part of the consumable stock of the mill, and the defendant had a right to and did make such use of it as it saw fit, being liable to pay therefor,

when demanded, either in money at the market price of grain of like grade and quality, or in other wheat of the same grade and quality. The effect of the transaction was, therefore, to create a debt from the defendant to the depositors, which it could pay either in money or in kind. The provisions in the wheat receipts as issued by the defendant, "damages by the elements excepted," and for the payment of storage charges and sacks, did not vary the nature of the transaction or change what would otherwise be a sale or exchange into a mere bailment. The contract must be ascertained from the general course of dealing and the entire transaction, and not from a single provision or provisions which defendant has seen proper to include in its wheat receipts. It cannot, by inserting into its receipt some clause or clauses which, standing alone, are inconsistent with a sale, change the entire nature of the transaction, and make a bailment out of what, in law and in fact, was a sale or exchange.

We are cited to a number of cases which are supposed to support the defendant's argument that, although the identical wheat delivered was consumed by defendant, the case is nevertheless one of bailment, as there was all the time wheat in the mill and warehouse or elsewhere in the state belonging to the defendant, equal in amount to that delivered and of the same grade and quality: *Moses v. Teetors*, 64 Kan. 149 (67 Pac. 526, 57 L. R. A. 267); *National Bank v. Langan*, 28 Ill. App. 401; *McGrew v. Thayer*, 24 Ind. App. 578 (57 N. E. 262); *State v. Rieger*, 59 Minn. 154 (60 N. W. 1087). *State v. Rieger* was under a special statute, and the other cases cited were those of warehousemen who did not have the right to use the grain stored with them as a part of their consumable stocks and for their own use and benefit. We conclude, therefore, that, for the reasons given, the judgment of the lower court was right, and must be affirmed. There is, however, another view of the case which is worthy of consideration, although not specially relied upon by plaintiff. It appears from the answer of defendant, as we understand it, that prior to the fire it had used or shipped from the warehouse and mill a part of the wheat which it claims was stored with it, and, at the time, there was a shortage of about

17,000 bushels. It, therefore, did not have on hand wheat sufficient to satisfy in full the claims of the parties who had deposited wheat with it. If the original contract was a mere bailment with the right in the defendant to ship or use the wheat deposited, there are authorities holding that the character of the transaction and the relation of the parties were changed when any part of the wheat was so used or shipped, and it could thereafter, at the election of the bailor, be treated as a completed sale: *Cloke v. Shafroth*, 137 Ill. 393 (27 N. E. 702); *Nelson v. Brown*, 44 Iowa, 455; *Bucher v. Commonwealth*, 103 Pa. 528.

The judgment of the court below will be affirmed.

AFFIRMED.

Decided 12 April, 1906.

ON PETITION FOR REHEARING.

MR. CHIEF JUSTICE BEAN delivered the opinion.

There is no finding that it was specifically agreed that the defendant should have the option to pay for the wheat in controversy either in money or in kind. The court, however, in its findings sets out in detail the facts constituting the contract between the parties, from which it conclusively appears that neither the wheat delivered by the plaintiff and his assignors nor wheat from the common mass into which it was put was to be returned, but that the wheat was to be mixed with and become a part of the consumable stock of the mill, to be sold and disposed of by the defendant on its own account. Findings 4 and 5, in substance, are that at the time the wheat was delivered and received, it was the custom and usual course of business of the defendant, known to and acted upon by persons dealing with it, for it to mix all wheat delivered with that belonging to it in one common mass; the first refusal of such wheat being reserved by and conceded to the defendant; and thereafter, "at its own convenience and pleasure" and "without any written authority," to "ship out any of such common mass * * or grind the same into flour and other mill products and the same to sell for the account and benefit of the defendant," and, generally, in settlement of the claims arising out of such delivery to "pay by

bank check or in money to the person delivering the wheat the market value at Salem, Or., on the day of settlement, of merchantable wheat of the quantity delivered, less warehouse charges," although, in some instances, settlements were made by delivery of wheat equal in quality and quantity to that received. And finding 16 is that the wheat of the plaintiff and his assignors was delivered and received in pursuance of and according to such usage, custom and regular course of business, and that the parties "contracted with reference to and relied upon" the same. The custom and general course of business, therefore, entered into and became a part of the contract between them, and the legal effect of the transaction is that the wheat was delivered and received under an agreement that it should be mixed with wheat belonging to the defendant and that the latter could, at its own convenience and pleasure, and without any further authority from the persons delivering it, sell and dispose of the wheat or grind it into flour and other mill products and sell the same for its own account and benefit; and this, as we have endeavored to point out, constitutes a sale, and not a bailment. The fact that there was no special or distinct agreement that defendant should have the option to pay for the wheat either in money or in kind is unimportant. If, as the findings show, neither the wheat delivered nor wheat from the common mass with which it was mixed was to be returned to the farmers, but it was understood that it should become a part of the consumable stock of the mill to be sold and disposed of by the defendant as its own, it necessarily follows that the title passed. The defendant could only discharge its obligation by paying for the wheat in some way, and whether it was required to make such payment in money, or had the option to pay in money or in kind, cannot change the legal effect of the transaction.

The petition for rehearing is therefore denied.

7. There is, however, a cross appeal by the plaintiff, which was not referred to in the opinion heretofore filed. The court below denied the plaintiff interest on the value of the wheat from the time of the demand in August, 1901, and from this ruling he appeals. As we have seen, this is an action on a contract to

recover the value of the wheat delivered by the plaintiff and his assignors to the defendant. The value of such wheat became due and payable on demand according to the contract, and should, therefore, bear interest from that time: B. & C. Comp. § 4595. The judgment will be modified accordingly, and the cause remanded to the court below, with directions to enter a judgment on the findings of fact in favor of the plaintiff for the value of the wheat delivered by him and his assignors to the defendant, together with legal interest thereon from the date of the demand.

MODIFIED AND AFFIRMED.

REHEARING DENIED.

Argued 20 February, decided 20 March, 1906.

JACKSON v. STEARNS.

84 Pac. 798.

ATTORNEY'S LIEN—WHEN BECOMES ENFORCEABLE.

1. Both by general law and the terms of the Oregon statute (B. & C. Comp. § 1063) an attorney has no lien for his services before judgment or decree, and until then the client may dismiss or compromise the case without reference to any contract with the attorney.

VALIDITY OF AGREEMENT WITH ATTORNEY NOT TO COMPROMISE LEGAL PROCEEDING—PUBLIC POLICY.

2. A clause in a contract stipulating for the payment of compensation to an attorney for performance of service in prosecuting a legal proceeding, and providing that the client shall not settle or dismiss the proceeding prior to the rendition of judgment, when the attorney's lien would attach, is against public policy and void.

PLEADING—SUFFICIENCY AGAINST GENERAL DEMURRER.

3. A pleading is good as against a general demurrer if it states at all or in any place a good cause of action or defense, and other matter may be eliminated for the purpose of the demurrer.

REMEDY OF ATTORNEY FOR FRAUDULENT DISMISSAL OF ACTION.

4. Though a party may without the consent of his attorney make a bona fide adjustment with the adverse party and dismiss a legal proceeding, yet if it appears that the adjustment was collusive, and with the intent on the part of both parties to defraud the attorney, the court may, to protect him, set aside the dismissal, and permit him to proceed in the cause in the name of his client to a final determination to ascertain what sum, if any, is due for his services.

FRAUDULENT COMPROMISE OF SUIT—INTENT OF CLIENT.

5. Before a court will set aside an order dismissing a legal proceeding without the consent of plaintiff's attorney and allow the latter to proceed with the cause in the name of his client to determine the amount of fees due him, it must appear that the client participated in the fraudulent intent to deprive the attorney of his compensation.

FRAUDULENT COMPROMISE—EVIDENCE OF BAD FAITH.

6. Where a legal proceeding is settled without the consent of the attorney, who has performed services under a contract, the adequacy of the consideration is an element to be considered in determining whether the settlement was made in good faith.

FRAUDULENT SETTLEMENT OF SUIT—PLEADING BAD FAITH.

7. In a suit by an attorney for the double purpose of enjoining the dismissal of another suit, on the ground that such dismissal was collusive and for the purpose of defrauding him of his fees, and to set aside a deed made pursuant to dismissal, an allegation that the value of the property conveyed by the deed was \$3,000, but that the deed was executed for a nominal consideration, is sufficient as an averment of the bad faith of the defendant in the original suit.

COLLUSIVE DISMISSAL OF SUIT—RIGHTS OF INJURED ATTORNEY.

8. Where a client, without the knowledge or consent of his attorney, settles a legal proceeding collusively for the purpose of depriving the attorney of his fees, the latter may, by giving to the party sought to be charged notice of his intention to continue the cause in the name of his client for the recovery of his fees only, continue the proceeding for that purpose, and hence is not entitled to maintain a proceeding to enjoin the dismissal.

STATUTE OF FRAUDS—CANCELING DEED—INTEREST OF PLAINTIFF.

9. Where an agreement between a client and his attorney, providing that the latter should prosecute a suit to remove a cloud from the title to certain land and receive one-half the land as his compensation in case the suit was successful, rested in parol, and the attorney never had possession of the land, he could not, in view of B. & C. Comp. § 793, requiring conveyances to be in writing, maintain a suit to set aside a deed from his client to the defendant in the original suit.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by C. S. Jackson against A. W. Stearns and H. J. Wilson, to enjoin the dismissal of another suit and to set aside a deed to real property. The complaint alleges, in effect, that the defendant Stearns, on September 22, 1904, was the owner and in the possession of 320 acres of land in Douglas County, particularly describing it, but that the defendant Wilson claimed to have some interest therein which constituted a cloud on the title; that Stearns employed plaintiff, who is an attorney, to bring a suit to remove the outstanding claim, representing that he had a meritorious cause, and could furnish the necessary evidence to substantiate his right, agreeing to give one half the real property if a favorable decree was secured, otherwise no compensation was to be paid, and also stipulating that he would not enter into any other agreement which would defeat the relief sought,

or settle the suit to be instituted without plaintiff's consent; that, relying upon such representations and contract, plaintiff immediately began the suit, and while it was pending the parties thereto fraudulently and collusively settled their difficulties, and Stearns, for a nominal consideration, executed a deed to Wilson of the entire real property which is of the value of \$3,000; that Stearns, who is insolvent, is attempting to dismiss such suit, and, unless he is restrained from executing his endeavor, plaintiff, who is able, ready and willing to prosecute the cause to a successful termination, will suffer irreparable loss, to prevent which he has no plain, speedy or adequate remedy at law. A demurrer to the complaint herein, on the ground that it did not state facts sufficient to constitute a cause of suit was sustained, and, the plaintiff at that time declining further to plead, this suit was dismissed. He thereafter moved, however, to set aside the dismissal, and for leave to file an amended complaint which was tendered; but the motion was denied and he appeals from the decree dismissing the suit, and from the order refusing to permit an amended complaint to be filed.

AFFIRMED.

For appellant there was a brief over the names of *Andrew Murray Crawford*, *J. A. Buchanan* and *J. T. Long*, with an oral argument by *Mr. Crawford*.

For respondents there was a brief with oral arguments by *Mr. J. C. Fullerton* and *Mr. A. N. Orcutt*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. The question presented for consideration is whether or not the complaint states facts sufficient to constitute a cause of suit. No decree had been rendered in the suit brought to remove the cloud from the title when Stearns executed to Wilson a deed to the premises, and at that stage of the case the statute raised no lien as security for attorney fees: B. & C. Comp. § 1063. In the absence of a legislative enactment regulating the matter, the rule is quite general that prior to securing a judgment or a decree in his favor a party to a suit or an action may, without the knowledge or consent of his attorney, compromise the dispute involved, thereby preventing an attorney's lien from attach-

FRAUDULENT COMPROMISE—EVIDENCE OF BAD FAITH.

6. Where a legal proceeding is settled without the consent of the attorney, who has performed services under a contract, the adequacy of the consideration is an element to be considered in determining whether the settlement was made in good faith.

FRAUDULENT SETTLEMENT OF SUIT—PLEADING BAD FAITH.

7. In a suit by an attorney for the double purpose of enjoining the dismissal of another suit, on the ground that such dismissal was collusive and for the purpose of defrauding him of his fees, and to set aside a deed made pursuant to dismissal, an allegation that the value of the property conveyed by the deed was \$3,000, but that the deed was executed for a nominal consideration, is sufficient as an averment of the bad faith of the defendant in the original suit.

COLLUSIVE DISMISSAL OF SUIT—RIGHTS OF INJURED ATTORNEY.

8. Where a client, without the knowledge or consent of his attorney, settles a legal proceeding collusively for the purpose of depriving the attorney of his fees, the latter may, by giving to the party sought to be charged notice of his intention to continue the cause in the name of his client for the recovery of his fees only, continue the proceeding for that purpose, and hence is not entitled to maintain a proceeding to enjoin the dismissal.

STATUTE OF FRAUDS—CANCELING DEED—INTEREST OF PLAINTIFF.

9. Where an agreement between a client and his attorney, providing that the latter should prosecute a suit to remove a cloud from the title to certain land and receive one-half the land as his compensation in case the suit was successful, rested in parol, and the attorney never had possession of the land, he could not, in view of B. & C. Comp. § 793, requiring conveyances to be in writing, maintain a suit to set aside a deed from his client to the defendant in the original suit.

From Douglas: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by C. S. Jackson against A. W. Stearns and H. J. Wilson, to enjoin the dismissal of another suit and to set aside a deed to real property. The complaint alleges, in effect, that the defendant Stearns, on September 22, 1904, was the owner and in the possession of 320 acres of land in Douglas County, particularly describing it, but that the defendant Wilson claimed to have some interest therein which constituted a cloud on the title; that Stearns employed plaintiff, who is an attorney, to bring a suit to remove the outstanding claim, representing that he had a meritorious cause, and could furnish the necessary evidence to substantiate his right, agreeing to give one half the real property if a favorable decree was secured, otherwise no compensation was to be paid, and also stipulating that he would not enter into any other agreement which would defeat the relief sought,

or settle the suit to be instituted without plaintiff's consent; that, relying upon such representations and contract, plaintiff immediately began the suit, and while it was pending the parties thereto fraudulently and collusively settled their difficulties, and Stearns, for a nominal consideration, executed a deed to Wilson of the entire real property which is of the value of \$3,000; that Stearns, who is insolvent, is attempting to dismiss such suit, and, unless he is restrained from executing his endeavor, plaintiff, who is able, ready and willing to prosecute the cause to a successful termination, will suffer irreparable loss, to prevent which he has no plain, speedy or adequate remedy at law. A demurrer to the complaint herein, on the ground that it did not state facts sufficient to constitute a cause of suit was sustained, and, the plaintiff at that time declining further to plead, this suit was dismissed. He thereafter moved, however, to set aside the dismissal, and for leave to file an amended complaint which was tendered; but the motion was denied and he appeals from the decree dismissing the suit, and from the order refusing to permit an amended complaint to be filed.

AFFIRMED.

For appellant there was a brief over the names of *Andrew Murray Crawford*, *J. A. Buchanan* and *J. T. Long*, with an oral argument by *Mr. Crawford*.

For respondents there was a brief with oral arguments by *Mr. J. C. Fullerton* and *Mr. A. N. Orcutt*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. The question presented for consideration is whether or not the complaint states facts sufficient to constitute a cause of suit. No decree had been rendered in the suit brought to remove the cloud from the title when Stearns executed to Wilson a deed to the premises, and at that stage of the case the statute raised no lien as security for attorney fees: B. & C. Comp. § 1063. In the absence of a legislative enactment regulating the matter, the rule is quite general that prior to securing a judgment or a decree in his favor a party to a suit or an action may, without the knowledge or consent of his attorney, compromise the dispute involved, thereby preventing an attorney's lien from attach-

ing to the money or property received by the client in settlement: 3 Am. & Eng. Enc. Law (2 ed.), 465; 4 Cyc. 990. Thus, as was said by Mr. Justice ANDREWS, in *Randall v. Van Wagenen*, 115 N. Y. 527 (22 N. E. 361, 12 Am. St. Rep. 828): "From the principle that there is no lien until judgment, it follows that it is competent for the parties acting bona fide to settle and discontinue a suit before judgment, without the consent of the attorney, and he is remitted to his remedy against his client for his compensation."

2. A clause in a contract stipulating for the payment of compensation to an attorney for the performance of service in prosecuting a suit or action, and providing that the client shall not settle or dismiss the proceedings prior to the rendition of a judgment or a decree therein, when the attorney's lien would attach by giving the proper notice, is against public policy, and therefore void: *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100 (49 N. E. 222, 44 L. R. A. 177); *Davis v. Webber*, 66 Ark. 190 (49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81); *Key v. Vattier*, 1 Ohio, 132. The reason assigned for this rule is based on the theory that the interest of society in maintaining peace demands the speedy settlement of controversies and advocates the amicable adjustment thereof, and, as the desired harmony would not be promoted by denying to a party the right to dismiss a suit or action without the consent of his attorney, an agreement by the terms of which a client attempts to waive such right is violative of public policy, and therefore unenforceable: *Elwood v. Wilson*, 21 Iowa, 523. The averment in the complaint of the agreement not to settle the controversy without plaintiff's consent is not a sufficient statement of facts to constitute a cause of suit on this branch of the case.

3. The demurrer interposed in the case at bar was general, and if any part of the complaint herein states facts entitling the plaintiff to equitable relief, the challenge submitted to his primary pleading for insufficiency should have been overruled, and, this being so, that part of the complaint to which attention has been called may be eliminated, and the remainder thereof considered, to determine whether or not an error was

committed in sustaining the demurrer: Bliss, Code Pl. (3 ed.) § 417; 6 Ency. Pl. & Pr. 346; *Waggy v. Scott*, 29 Or. 386 (45 Pac. 774).

4. Though a party may, without the consent of his attorney, make a *bona fide* adjustment with the adverse party and dismiss an action or a suit before a judgment or a decree has been rendered therein, if it appears, however, that such settlement was collusive and consummated pursuant to the intent of both parties to defraud the attorney, the court in which the action or suit was pending may interfere to protect him, as one of its officers, by setting aside the order of dismissal, and permitting him to proceed in the cause in the name of his client as plaintiff to final determination to ascertain what sum of money or interest in the subject-matter, if any, is due him for his services when fully performed: *Jones v. Morgan*, 39 Ga. 310 (99 Am. Dec. 458); *Randall v. Van Wagenen*, 115 N. Y. 527 (22 N. E. 361, 12 Am. St. Rep. 828). See, also, the notes to *Hanna v. Island Coal Co.* 51 Am. St. Rep. 246, where it is said: "Sometimes a collusive settlement is made between the parties for the purpose of defrauding the attorney of his fee before any judgment or decree has been obtained. When there is an evident intention thus to cheat the attorney, and to defraud him of his rights, the proper course for the attorney to pursue is to proceed with the suit in the name of his client, notwithstanding the collusive settlement, for the purpose of collecting his costs." See, also, on the same subject, the notes to *Cameron v. Boeger*, 93 Am. St. Rep. 165. Mr. Justice EARL, in *Coughlin v. New York, C. & H. R. R. Co.* 71 N. Y. 446 (27 Am. Rep. 75), illustrating this principle, says: "It is certainly a general rule that parties to an action may settle the same without the intervention of the attorneys. Generally, a plaintiff who has a cause of action against a defendant may release and discharge it upon such terms as are agreeable to him. This he may do while the action is pending, and after judgment he may cancel and discharge the judgment. In all this generally he infringes upon no privilege, and violates no right of his attorney. But since the time of Lord Mansfield, it has been the practice of courts to intervene to protect

attorneys against settlements made to cheat them out of their costs. If an attorney has commenced an action, and his client settles it with the opposite party before judgment, collusively, to deprive him of his costs, the court will permit the attorney to go on with the suit for the purpose of collecting his costs." To the same effect is the case of *Falconio v. Larsen*, 31 Or. 137 (48 Pac. 703, 37 L. R. A. 254), which was continued in the name of the original plaintiff, notwithstanding an alleged settlement between the parties.

5. Before a court will set aside an order dismissing a suit or an action, made upon stipulation of the parties, without the consent of plaintiff's attorney, and allow the latter to proceed with the cause in the name of his client, to determine the amount of fees due him, it must appear that the defendant participated in the fraudulent intent to deprive the attorney of his compensation: *Courtney v. McGavock*, 23 Wis. 619.

6. When no adequate consideration is given by the defendant for the settlement and discharge of an action or a suit, the insufficiency of the inducement to the contract affords evidence of his bad faith: *Young v. Dearborn*, 27 N. H. 324.

7. It will be remembered that the complaint alleges that the value of the real property in question is \$3,000, and that Stearns executed to Wilson a deed to the premises for a nominal consideration. This is a sufficient averment of the defendant's intent to deprive the plaintiff of his compensation, thereby imputing to Wilson bad faith.

8. Based on the *prima facie* case thus made by the complaint herein, was the plaintiff entitled to maintain an independent suit in equity for the relief to which he is entitled? To avoid interminable litigation, the rule is quite general that an injunction will not be granted to stay proceedings in another equitable suit in the same court, either upon the application of the parties to the proceedings to be restrained, their privies, or of strangers thereto, when no reason is assigned why the relief desired was not invoked in the prior suit: *High, Injunctions* (4 ed.), § 52; *Spelling, Extraor. Rem.* (2 ed.) § 47; 16 *Am. & Eng. Enc. Law* (2 ed.), 372. The text-books cited in support of the legal prin-

ciple thus declared recognize in the same, or in succeeding paragraphs, an exception to this rule in cases of interpleader. When a plaintiff, without the knowledge or consent of his attorney, settles a pending suit with an adverse party, the attorney, by giving distinct notice to the party sought to be charged, of his intention to continue the cause in the name of his client for the recovery of his fees only, may proceed with the suit for that purpose in such manner, notwithstanding the settlement: *The Sarah Jane*, 1 Blatchf. & H. 401 (Fed. Cas. No. 12,348); *Peterson v. Watson*, 1 Blatchf. & H. 487 (Fed. Cas. No. 11,037). This being the proper mode of securing the compensation to which plaintiff was justly entitled, he could have obtained adequate relief in the original suit, in the name of his client, and there was no apparent necessity for his becoming a party to the prior proceedings in equity by intervention or by bringing an independent suit as in the case at bar.

Thus, in *Randall v. Van Wagenen*, 115 N. Y. 527 (22 N. E. 361, 12 Am. St. Rep. 828), a suit having been settled and discontinued by agreement of the parties without the consent of the plaintiff's attorney therein, the latter brought an independent suit, as in the case at bar, against the parties to the former proceeding, to recover the compensation stipulated to be paid, but the complaint was dismissed, the court holding that the attorney should have proceeded in the original suit in the name of his client, notwithstanding the settlement. In speaking of the method to be pursued in such cases, Mr. Justice ANDREWS says: "This is an adequate remedy, and, we think, the exclusive remedy, where the suit had been fraudulently settled by the parties before judgment, to cheat the attorney out of his costs. We have found no case of an equitable action to enforce the inchoate right of an attorney under such circumstances, and no such precedent ought, we think, to be established. * * This disposes of the action so far as it seeks to enforce, by means of an independent and original suit, the equitable right of the plaintiff, sought to be defeated by the alleged fraudulent and collusive settlement." So, too, in *Story v. Hull*, 143 Ill. 506 (32 N. E. 265), the trial court dismissed an independent suit instituted

by an attorney to recover compensation to which he claimed to have been entitled for services performed in another suit, which was settled by agreement of the parties thereto without his consent. Mr. Justice BAKER, in deciding that case, observes: "Said decree properly dismissed the intervening petition of appellant out of court, on the ground that the court of equity had no jurisdiction of the subject-matter of such petition." In *Williams v. Ingersoll*, 89 N. Y. 508, an attorney was permitted to maintain an independent suit against adverse parties, to recover compensation due him for services performed in another suit in which a sum of money was found due from them to his client pursuant to an award. Before this money was paid, however, it was sought to be appropriated by legal proceedings instituted against such client by other parties. The right of the attorney to be paid out of the fund that he had created, in preference to others, was recognized on the ground that as the defendants in the independent suit had not paid the money to any person, they were stakeholders and came within the well-recognized exception to the general rule hereinbefore adverted to: 16 Am. & Eng. Enc. Law (2 ed.), 372.

We have not overlooked the cases of *Kansas Pac. Ry. Co. v. Thatcher*, 17 Kan. 92, nor *Farry v. Davidson*, 44 Kan. 377 (24 Pac. 419), where in the former case attorneys were permitted to maintain an independent action against an adverse party to recover fees due from clients, who, without consent of their attorneys, had settled the controversy involved, and in the latter case, under similar conditions, the attorneys were denied the right to proceed in the original action in the name of their clients to recover the compensation agreed upon. In the *Kansas* case first cited, a section of the statute of that State is quoted in the opinion as follows: "An attorney has a lien for a general balance of compensation * * upon money due to his client, and in the hands of the adverse party, in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party." In construing this provision, in *Kansas Pac. Ry. Co. v. Thatcher*, 17 Kan. 92, Mr. Justice

BREWER says: "Whenever an action is pending in which money is due, the attorney may establish his lien." Our statute contains a similar provision, to wit: "An attorney has a lien for his compensation, whether specially agreed upon or implied, as provided in this section. * * (3) Upon money in the hands of the adverse party, in an action, suit, or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party": B. & C. Comp. § 1063. If it be assumed that the clause last quoted warrants such a construction as was given to the Kansas statute in the cases mentioned, the rule there adopted cannot be invoked herein, for Wilson the adverse party did not have any money in his hands belonging to Stearns in the suit in which plaintiff was employed, nor so far as disclosed by the complaint was any notice of lien ever given to Wilson as the party to be charged.

9. It will be remembered that the relief sought by plaintiff in the case at bar, in addition to the injunction, was the cancellation of the deed executed by Stearns to Wilson. Plaintiff's contract with Stearns, whereby it is alleged in the complaint he was to receive a moiety of the land specified, if he secured a favorable decree in the original suit, was not evidenced by any writing, in the absence of which he secured no estate or interest in the premises: B. & C. Comp. § 793. Nor did he take possession of the land, so as to be able specifically to enforce the terms of his agreement as against his client, and hence he could not have Wilson declared a trustee holding the legal title for him. By proceeding in the original suit against Wilson in the name of his client, plaintiff might possibly have been able to recover compensation for his services, if he could have obtained therein the decree specified, but because of the insufficiency of his contract with Stearns, he could not secure a cancellation of the deed executed by his client to Wilson. The plaintiff was therefore not entitled to any part of the relief demanded in the complaint herein, and no error was committed in sustaining the demurrer thereto. The amended complaint states facts relied upon with greater particularity than the original pleading, but

as the averments thereof are insufficient to entitle plaintiff to the equitable relief invoked, the court did not abuse its discretion in refusing to permit the amended complaint to be filed.

It follows from these considerations that the decree should be affirmed, and it is so ordered. **AFFIRMED.**

Argued 25 January, decided 27 March, 1906.

BLUST v. PACIFIC TELEPHONE CO.

84 Pac. 847.

MASTER AND SERVANT—DUTY TO FURNISH APPLIANCES.

1. Though a master is under an obligation to use due care in providing suitable and safe materials and appliances, he is not bound to provide the most improved appliances, and his duty is discharged when he has furnished appliances that are reasonably safe and suitable when properly used.

DUTY TO MAKE RULES—HANGING TELEPHONE CABLES.

2. Under some conditions it becomes the duty of the master to make and enforce suitable rules for the government of his employees in doing certain work, but not when the work is simple and the use of the appliances obvious, as, in putting up telephone cables by wire ropes and hooks.

ASSUMPTION OF KNOWN RISK.

3. An experienced lineman, familiar with the methods and appliances usually used in stringing wires and cables on poles, and particularly with the method used by a particular employer, who returns to work and continues with that employer without objection to the method in use, assumes the risk of that manner of doing the work.

From Multnomah: **ALFRED F. SEARS, JR., Judge.**

John A. Blust appeals from a judgment of nonsuit in an action for damages brought by him against the Pacific States Telephone & Telegraph Co. **AFFIRMED.**

For appellant there was a brief over the name of *Veazie & Freeman*, with an oral argument by *Mr. Frank Forrest Freeman*.

For respondent there was a brief over the name of *Carey & Mays*, with an oral argument by *Mr. Charles Henry Carey*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover damages for a personal injury received by the plaintiff while in the employ of the defendant. On October 13, 1903, he was engaged with other employees in putting up a telephone cable in the City of Portland, and while at work was knocked or thrown from the pole upon which he

was working to the ground by the cable falling and striking him. The cable was about 1,000 feet long, and consisted of 100 pairs of copper wires incased in a sheathing of lead, and weighed from two to three pounds to the linear foot. It was brought to the place of work wound on a reel, and the manner of putting it up was as follows: A wire rope, called a "messenger," was first strung taut 25 feet from the ground on poles 150 feet apart, to support the cable after it was in place. A snatchblock was attached to one of the poles near the messenger, some distance in advance of where it was proposed to commence hanging the cable. A rope passed from a windlass on the ground through the snatchblock along the poles, and was attached to the end of the cable, by means of which it was unwound from the reel and drawn along under the messenger by the persons operating the winch or windlass. From the reel to the pole nearest it was a lead wire, to support the cable until it reached the messenger. As the cable was unwound from the reel, one of the crew attached to it, by means of pieces of rope or marline, wire hooks at intervals of 10 or 15 feet, which hooks were placed over the lead wire to support the cable temporarily as it was being drawn up to and along the messenger; but after it was in place it was firmly hung from the messenger by clips about two feet apart. The wire and marline from which the temporary hooks and supports were made were furnished by the defendant, and cut into suitable lengths and made into proper shape by the employees engaged in the work. Two men were stationed on the pole nearest the reel to lift the hooks from the lead wire to the messenger, and an employee was stationed on each of the poles between the reel and the snatchblock to lift the hooks over the steps on the poles as the cable was being unwound. In putting up this particular cable the plaintiff worked for a time at the first pole to assist in passing the hooks from the lead wire to the messenger, and therefore knew the interval between the hooks and the manner in which they were attached to the cable. He was subsequently transferred to the pole nearest the snatchblock. When the end of the cable reached the snatchblock, he came down from the pole by the direction of the foreman, as he

supposed, to go up the other pole and detach the snatchblock, so it could be moved farther along. About the time he reached the ground, however, he saw Sloper, another employee and a member of the crew, go up the pole and remove the snatchblock, and he thereupon climbed up his own pole under the cable and was in the act of fastening his safety belt around the pole, when the supports of the cable gave way, causing it to fall on him, throwing him to the ground, and injuring him severely. When Sloper removed the rope from the snatchblock he did not fasten it to the step or the pole to keep the cable from slipping back.

The plaintiff was an experienced lineman and had been engaged in that business for three or four years. He had worked for the defendant a considerable portion of the time, and had assisted in putting up cables in the same manner, with the same appliances, and under the same system as at the time of the accident. He commenced work for the defendant the last time about a week before the accident, and knew the method and appliances used by it in stringing its cables, and was familiar with the manner in which the work was done, and with such knowledge entered its employment. There was evidence tending to show that other, and perhaps safer, methods and appliances were sometimes used by telephone companies in stringing their cables, such as a sheave having an iron frame to which the cable was attached, or hooks made of hard wire or tempered steel fastened to the cable by a clamp or wooden sheave to run on the messenger and attached to an iron frame having a hook at the bottom in which the cable was placed and tied with marline; but there was no evidence that the hooks and marline as furnished by defendant were not such as the usage of the business sanctioned as reasonably safe when properly used. Expert testimony was offered and admitted to the effect that the hooks and marline, as placed on the cable at the time of the accident, were not sufficient to support it, but should have been more securely fastened and placed nearer together. At the close of the plaintiff's testimony, the court held that the evidence was insufficient to entitle him to recover, and granted an involuntary nonsuit.

The negligence charged is: (1) That defendant failed and neglected to provide suitable pulleys or supports for the cable while it was being put up, but carelessly and negligently furnished the workmen with unsafe, improper and unsuitable appliances and material; (2) that defendant failed and neglected to make and promulgate safe and proper rules and regulations touching the use of the supports or to instruct the workmen in reference thereto; and (3) that defendant carelessly and negligently employed incompetent and unskillful fellow servants.

1. It is unquestionably the duty of a master to use due care to provide suitable and safe materials, appliances and machinery reasonably well adapted to the work in hand, without endangering the lives and limbs of those employed to use the same, but he is not bound to provide the latest or most improved, but only such as are reasonably safe, and of a kind generally used for the purpose. If the appliances furnished or the method adopted by the master is reasonably safe and suitable for the purpose intended, he is not liable for a failure to furnish or adopt others believed by some to be less perilous: *Kincaid v. Oregon Short Line Ry. Co.* 22 Or. 35 (29 Pac. 3); *Nutt v. Southern Pac. Co.* 25 Or. 291 (35 Pac. 653); *Duntley v. Inman*, 42 Or. 334 (70 Pac. 529, 59 L. R. A. 785); *Indiana Car Co. v. Parker*, 100 Ind. 181; 1 Labatt, Mast. & Serv. 35-39. And, where a master discharges his duty by furnishing suitable appliances and material for the workmen, he is not responsible for the negligent use thereof by them: *Conner v. Draper Co.* 182 Mass. 184 (65 N. E. 39); *Hackett v. Masterson*, 84 N. Y. Supp. 751. Now, in this case, the hooks and marline furnished by defendant for the support of the cable while it was being put up were suitable and safe and entirely sufficient for the purpose, if they had been properly used. The cable fell, not because of an inherent defect in the appliances, but because the workmen neglected to put the supports sufficiently near together as the cable was being unwound from the reel, and for this negligence the defendant is not responsible.

2. But it is argued that it was the duty of the defendant to

promulgate and enforce rules and regulations governing the matter of attaching the hooks or supports to the cable, and providing the distances they should be apart. When the business in which the master is engaged is complicated or dangerous, or where the employees work in different departments or at different sorts of work, and the safety of one depends upon the performance of the duties of another at stated times or in a particular manner, it is the duty of the master to provide and enforce suitable rules and regulations governing their conduct and that of the business: 1 *Labatt, Mast. & Serv.* 210; 2 *Current Law*, 818; *Voss v. Delaware, L. & W. R. Co.* 62 N. J. Law, 59 (41 Atl. 224). But when the duties to be performed by the servants are simple and the appliances easily understood, rules are not required: *Olsen v. Northern Pac. Lum. Co.* 100 Fed. 384 (40 C. C. A. 427); *Wagner v. Portland*, 40 Or. 389 (60 Pac. 985, 67 Pac. 300); *Johnson v. Portland Stone Co.* 40 Or. 436 (67 Pac. 1013, 68 Pac. 425); *Boyer v. Eastern Ry. Co. of Minn.* 87 Minn. 367 (92 N. W. 326); *Wagner v. N. Y., etc. R. Co.* 76 App. Div. 552 (78 N. Y. Supp. 696). Now, there was nothing in the nature of the work in which plaintiff and his fellow servants were engaged at the time of the accident which required a rule providing how frequently the supports should be attached to the cable, or the manner in which the work should be performed. That was a mere detail left entirely to the judgment and discretion of the workmen. They were at liberty to attach the supports to the cable in such manner, and as close together as they thought proper, and if they were careless or negligent in that regard, the defendant is not responsible, and it was not a matter for it to regulate by rules. For these reasons we do not think the plaintiff can recover.

3. But there is another and equally as fatal defect in his case. The evidence shows that he was an experienced lineman. He had worked at that business for several years, and was accustomed to putting up cables of the kind which he was at work on when injured. He was familiar, not only with that character of work in general, but with defendant's manner of doing it in particular. He had previously worked for the defendant, and

with knowledge of the appliances used by it in stringing cables, and with the manner in which the work was conducted, he voluntarily re-entered its employment. If, therefore, it be conceded that there is some evidence tending to show that the defendant failed to exercise ordinary care to furnish reasonably safe appliances for the support of the cable or to promulgate suitable rules for the conduct of the work, the case is ruled by the established principle that a servant entering or continuing in the employment of a master, with knowledge of the defective appliances used by him or the imperfect method of his work, without objection or complaint, assumes the added risk caused thereby, and cannot recover for an injury resulting from the use of such defective or insufficient method: *Stone v. Oregon City Mfg. Co.* 4 Or. 52; *Scott v. Oregon Ry. & Nav. Co.* 14 Or. 211 (13 Pac. 98); *Brown v. Oregon Lum. Co.* 24 Or. 315 (33 Pac. 557); *Tucker v. Northern Term. Co.* 41 Or. 82 (68 Pac. 426); *Greene v. Western Union Tel. Co.* (C. C.) 72 Fed. 250. "The general rule of law is," says Mr. Chief Justice LORD, in *Brown v. Oregon Lum. Co.* 24 Or. 315 (33 Pac. 557), "that a servant assumes all the risks ordinarily incident to his employment, and also all additional or unusual risks which he may knowingly and voluntarily undertake. It is one of the implied conditions of every contract for employment that the servant is competent to discharge the duties for which he is employed: *Wood, Mast. & Serv.* 166. In accepting service, he not only assumes the risks reasonably to be anticipated as incident to it; but he also assumes that he has the capacity to understand the nature and extent of such service, and has the requisite ability to perform it."

A servant who voluntarily enters the employment of another, with knowledge of the defective appliances or methods used by that other, cannot be heard to say that he did not appreciate or realize the danger, where the defect was obvious and the danger would have been known and appreciated by an ordinarily prudent person of his intelligence and experience: *St. Louis Cordage Co. v. Müller*, 126 Fed. 495 (61 C. C. A. 477, 63 L. R. A. 551). There was nothing intricate or complicated about the work in which plaintiff was engaged. The appliances furnished

and used to support the cable, and the manner of doing the work were open and visible, and the danger incident thereto obvious to a person of plaintiff's intelligence and experience. It was plain and certain to an observing person that, if the cable was not properly supported by hooks attached sufficiently near together, it would fall and might injure the workmen, and without a disregard of the established rules of law there seems no escape from the conclusion that plaintiff, by voluntarily entering and continuing in the employment of the defendant, with knowledge of the appliances used and the system adopted by it without complaint, assumed the risk of the injury he sustained. As we understand the record, no particular claim is made that the injury to the plaintiff was due to the act of an incompetent fellow servant. It is true that Sloper, who removed the rope from the snatchblock, was a "groundman." He had not yet "graduated" into a lineman, but the evidence does not show that his failure to fasten the rope to the step or the pole was the proximate cause of the injury. Moreover, the plaintiff was a witness to Sloper's act, and thereafter voluntarily reascended the pole at which he had been working, and so assumed the danger, if any, from Sloper's failure to fasten the rope.

From these views it follows that the judgment must be affirmed.

AFFIRMED.

Argued 23 January, decided 3 April, rehearing denied 29 May, 1906.

LIVESLEY v. JOHNSTON.

84 Pac. 1044.

APPEAL—SUBSEQUENT WAIVER OR TERMINATION—EVIDENCE DEHORS.

1. Where the controversy has been settled after the entry of the judgment or decree appealed from, or the right of appeal has been in some manner waived, evidence outside the record is admissible to establish the facts as a basis for a motion to dismiss.

APPEAL—DISMISSAL BECAUSE OF NEWLY DISCOVERED EVIDENCE.

2. A motion to dismiss an appeal because of newly discovered evidence material to the cause of the appellant should be overruled, the proper proceeding being by a suit to annul the order appealed from; and a claim of settlement during the trial in the lower court between the respondent and one jointly liable with the appellants, without the knowledge of appellants, and which was concealed from them, is in the nature of newly discovered evidence not justifying a dismissal of the appeal.

SPECIFIC PERFORMANCE—LACHES—HOP ADVANCES.

3. Where a contract for the purchase of hops to be grown required the purchaser to make certain advances "about April 1," and on March 28 he sent the money to the seller, but stopped payment of the checks on the 31st, claiming the payment to have been premature, yet expressing an intention to perform the contract, and on April 4 and on several occasions within the next six months offered to comply with his part of the contract, there was no laches or inequitable conduct barring a suit for specific performance.

EVIDENCE OF SOLVENCY.

4. The evidence is satisfactory that the vendor in the contract in question was not so financially conditioned as that an action against him for damages would have been as effective as a suit for the specific performance of such contract.

SPECIFIC PERFORMANCE—ALTERNATIVE RELIEF OF DAMAGES.

5. Where the defendants in a suit for the specific performance of a contract of sale dispose of the property during the pendency of the suit, equity may retain jurisdiction and award the plaintiff damages in lieu of the article contracted to be delivered.

MEASURE OF DAMAGES AWARDED IN LIEU OF SPECIFIC PERFORMANCE OF CONTRACT TO SELL.

6. Where damages are awarded in place of a decree for specific performance of a contract to sell, the proper amount is what plaintiff would have been entitled to in a law action for damages for breaching the contract.

SALES—MEASURE OF DAMAGES FOR BREACH.

7. In action of damages by a purchaser against a seller for refusing to deliver the property contracted for, the measure of damages is the value of the property at the time of the refusal, less the agreed price to be paid, with interest, which is here an element of damage.

From Marion: GEORGE H. BURNETT, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

On September 5, 1902, the plaintiffs, T. A. Livesley & Co., entered into a contract with the defendant, John Johnston, Jr., by the terms of which the latter agreed to sell and deliver to the plaintiffs and they agreed to purchase 20,000 pounds of hops at 9½ cents a pound, for each of the years from 1903 to 1907, inclusive, such hops to be grown on a yard leased by Johnston from Frank Chappelle and others. The plaintiffs agreed to advance to Johnston on or before April 1st of each year \$336, with which to pay the rent of the yard, and \$250 "on or about April, May and June," for cultivating purposes, and at or during picking time 4½ cents a pound for picking purposes, the balance of the purchase price to be paid when the hops were delivered to and accepted by the plaintiffs. The contract was

so drawn that the advances made and to be made by the plaintiffs were to become a lien upon the hops. Johnston refused to deliver the hops for the year 1903, and on the 24th of September this suit was commenced against Johnston, Wolf & Son, and the Southern Pacific Co. to compel a specific performance of the contract and to restrain and enjoin the sale or disposition of the hops or their removal from the jurisdiction of the court. In their complaint plaintiffs allege that they were and are ready and willing to perform all the terms and conditions of the contract on their part and tendered and offered to make the advances as stipulated, but that Johnston refused to accept the same and early in the year 1903 notified them that he would no longer be bound by the contract, and would not deliver the hops as agreed upon; that Johnston is insolvent and wholly unable to answer in damages for a breach of the contract. Wolf & Son were made defendants on the ground that they claimed a lien on the hops, and the Southern Pacific Co. because the hops had, prior to the commencement of the suit, been delivered to it for storage and transportation, and were then in its possession. A preliminary injunction was issued as prayed for, restraining the defendants, and each of them, from selling, disposing of, encumbering or removing the hops from the jurisdiction of the court, but a demurrer to the complaint was sustained, and a decree entered dismissing the suit, and dissolving the injunction. From this decree an appeal was taken, and the cause reversed and remanded for such further proceedings as might be deemed proper: *Livesley v. Johnston*, 45 Or. 30 (76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647). After the mandate had been returned to the court below, the plaintiffs filed a supplemental complaint, setting up the commencement of the original suit, the preliminary injunction, the motion to dissolve such injunction, the demurrer to the complaint, and the rulings thereon, the appeal therefrom, and the decision on such appeal, and averring that after the appeal had been taken and perfected, and a supersedeas bond given, the defendant Johnston, for the purpose of cheating and defrauding the plaintiffs, sold the hops to his codefendants, Wolf & Son, who caused

them to be removed from the State by the defendant the Southern Pacific Co.; that the hops were bought by Wolf & Son and removed by the Southern Pacific Co. for the purpose of defeating any decree plaintiffs might recover in the suit; and that the hops so disposed of and removed from the State were of the value of \$5,000, by reason whereof plaintiffs have been damaged and defrauded out of \$3,100 over and above the amount they agreed to pay therefor.

The defendant Johnston in his answer admits the execution of the contract as alleged, but denies that plaintiffs have been ready and willing to perform the contract on their part, or that they tendered or offered to make the advances as stipulated, or to perform any of the conditions of the contract; or that he is insolvent or unable to answer in damages for breach of the contract; admits that he raised 20,000 pounds of hops during the year 1903, which he delivered to the Southern Pacific Co. for his codefendants Wolf & Son; but denies that the same was in contravention of any contractual rights of the plaintiffs. For a further and separate defense he pleads a breach by the plaintiffs of the stipulation that they would advance on or before April 1st of each year money with which to pay rent, and "on or about April, May and June," money for cultivating purposes, by alleging that on or about the 2d of April they notified him that they would refuse to pay the rent or make the required advances or deal further with him under the contract; that defendant was without money with which to pay the rent and was in great peril of losing his lease and suffering great and irreparable damage, and therefore immediately after the default of the plaintiffs notified them that he had rescinded the contract and would no longer be bound thereby; that in order to preserve his rights he was compelled to, and did, borrow of the defendants Wolf & Son money with which to pay the rent, and entered into a contract with them for such money as might be necessary properly to cultivate, harvest and market the crop, since which time he has had no contractual relations whatever with the plaintiffs; that up to the time of the default by the plaintiffs, he was ready and anxious to comply with the contract

on his part, but was prevented from so doing by reason of the refusal of the plaintiffs to make the advances to him as stipulated. He also alleges that he is solvent and has property to the value of \$8,200, and is therefore able to satisfy on execution any judgment plaintiffs may secure against him for breach of the contract.

The defendants Wolf & Son admit the execution of the contract between the plaintiffs and Johnston, but deny all other allegations of the complaint on information and belief, and affirmatively allege that on or about April 3, 1903, they loaned Johnston \$336 with which to pay the rent on his hopyard, and thereafter, on May 10th, entered into an agreement with him to advance money for the purposes of cultivating, picking, harvesting and marketing the hops; that at the time of making such advances and contract they believed, in good faith, that the agreement between him and the plaintiffs had been lawfully rescinded and the contractual relations terminated; that in pursuance of their agreement and contract with Johnston they have advanced to him from time to time money for the purposes of cultivating, harvesting and marketing the hops amounting in the aggregate to the sum of \$1,818.49; that after the preliminary injunction had been dissolved they purchased the hops of Johnston in good faith, believing they had a right to do so, and paid him therefor. Johnston and Wolf & Son joined in an answer to the supplemental complaint in which they admit all the material matters alleged therein except that the acts charged were done with a fraudulent purpose or design.

The Southern Pacific Co. answered the original complaint denying a part of the allegations thereof and alleging that it received the hops from Johnston for Wolf & Son as a warehouseman and common carrier for the purposes of storage and transportation only, and that it had no other interest therein; that at the time the preliminary injunction was dissolved, the court ruled and so stated in the presence of counsel that it could remove or dispose of the hops as it might see fit, and relying on the order dissolving the preliminary injunction and such opinion and ruling, it did thereafter on or about the ——day of Decem-

ber, 1903, deliver the hops to Wolf & Son upon their demand and that of the defendant Johnston, and thereby parted with the possession and control thereof.

The plaintiffs filed replies to the several answers of the defendants in which they deny the material allegations of such answers and affirmatively allege that on March 28, 1903, they mailed to the defendant Johnston their check on Ladd & Bush, bankers of Salem, for the sum of \$336, payable to the owners or lessors of the hopyard, and at the same time a check for \$250, payable to Johnston personally on account of advances to be made by them on their contract; that on the 31st of March, they observed that the payment of the \$250 to Johnston was premature and so notified him, and stopped payment of the check therefor, but not the check in favor of the owners of the land for rent; that no objection was made by Johnston at any time that the payment of the advances was made by checks and not in money; that at the time the checks were drawn and at all times plaintiffs had and still have sufficient funds in Ladd & Bush's bank to pay such checks; that immediately upon the rendition of the decree dissolving the preliminary injunction, the plaintiffs appealed and served and filed an undertaking for stay of execution; that the sale of the hops by Johnston to Wolf & Son was made after such appeal had been taken and perfected, with full knowledge of the plaintiffs' contention. Upon the issues thus joined the cause was tried and decree rendered in favor of plaintiffs and against the defendants jointly for the sum of \$2,500, the value of the hops at the time stipulated for their delivery by Johnston to the plaintiffs over and above the price which plaintiffs were to pay therefor, with interest thereon at the rate of 6 per cent per annum from October 31, 1903. From this decree the present appeal was taken by all the defendants. Subsequently, by stipulation, the appeal was dismissed as to Johnston, leaving it in force as to Wolf & Son and the railroad company.

AFFIRMED.

For appellants there were oral arguments by *Mr. George Greenwood Bingham* and *Mr. Anderson M. Cannon*, with a brief over the names of *Carson & Cannon*, *W. D. Fenton* and *G. G. Bingham*, to this effect.

I. Whosoever approaches a court of equity must do so with clean hands; therefore such a court will not extend the extraordinary relief of specific performance to one who has himself trifled or shown a backwardness or whose actions have helped to produce the situation of which he complains. Such a suitor will be turned away to be satisfied with such remedy as he may have at law: *Kinney v. Redden*, 2 Del. Ch. 46; *Benedict v. Lynch*, 1 Johns. Ch. 370 (4 Am. Dec. 484); *Stauntenburg v. Tompkins*, 9 N. J. Eq. 332; *Conrad v. Lindley*, 2 Cal. 173; *Clark v. Maurer*, 77 Iowa, 717; *Kirby v. Harrison*, 5 Ohio St. 326; *Wormser v. Garvey*, 4 Hun, 478; *Guest v. Homfray*, 5 Ves. Jr. 818.

II. Interest does not begin to run on unliquidated damages until merged in judgment: *B. & C. Comp.* § 4595; *Glidden v. Street*, 68 Ala. 600; *Buckmaster v. Grundy*, 8 Ill. 626; *Randall v. Greenwood*, 3 Mont. 506; *Eagan v. Missouri Pac. Ry. Co.* 6 Mo. App. 594; *Brady v. Wilcoxon*, 44 Cal. 239; *Viatti v. Nesbitt*, 22 Nev. 390; *Hartman's Estate*, 35 N. Y. Supp. 495; *Shipman v. State*, 44 Wis. 458.

III. An unliquidated demand is one which the parties are themselves unable to render certain: *Roberts v. Prior*, 20 Ga. 61; *Harvey v. Hamilton*, 155 Ill. 377 (40 N. E. 592).

For respondents there were oral arguments by *Mr. Woodson T. Slater* and *Mr. Wirt Minor*, with a brief over the names of *Teal & Minor*, *W. T. Slater* and *W. M. Kaiser*, to this effect.

1. Where a contract fixes a day certain on which a thing is to be done, the promissor has until the last minute of the last day to perform his obligation, which had clearly not elapsed in the present instance: *Curtis v. Blair*, 26 Miss. 309 (59 Am. Dec. 257); *Catts v. King*, 5 Maine, 482, 486; *Purinton v. Sidgley*, 54 Maine, 276, 283 (89 Am. Dec. 748); 9 Cyc. 608.

2. One who purchases from a party to a suit the subject matter of the litigation, after the court has acquired jurisdiction, is bound by the result, whether he paid value or not, and without reference to notice either express or implied: *Houston v. Timmerman*, 17 Or. 499 (4 L. R. A. 716, 11 Am. St. Rep. 848, 21 Pac. 1037); *Earle v. Couch*, 60 Ky. (3 Met.) 450; *Tilton v. Cofield*, 93 U. S. 163.

3. When a defendant, during the pendency of a suit for specific performance of a contract, voluntarily so acts that he cannot comply with the contract, a court of equity may retain the suit and award compensation in money instead of performance, on the ground of avoiding a multiplicity of suits; *Waterman*, Spec. Perf. § 517; *Milkman v. Ordway*, 106 Mass. 232; *Greenway v. Adams*, 12 Wis. 395; *Woodcock v. Bennett*, 1 Cow. 711 (13 Am. Dec. 568); *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 273; *Philips v. Thompson*, 1 Johns. Ch. 131; *Morse v. Eldendorf*, 11 Paige Ch. 277; *Wiswall v. McGowan*, Hoffman, Ch. 125.

4. The effect in equity of the contract between respondents and Johnston with respect to personal property not in existence at the time, but to be produced, is to make respondents the equitable owner thereof as soon as the property came into existence, and Johnston holds the legal title as trustee for respondents, and whoever buys with notice of such contract holds subject to respondents' rights: *Pomeroy*, Equity (1 ed.), §§ 365-9, 373, 689, note 5; *Livesley v. Johnston*, 45 Or. 30 (76 Pac. 946, 65 L. R. A. 783, 106 Am. St. Rep. 647); *Briggs v. United States*, 143 U. S. 346; *Willoughby v. Lawrence*, 116 Ill. 11 (56 Am. Rep. 758); *Kettle River Co. v. Eastern Ry. Co.* 41 Minn. 461; *Waterman*, Spec. Perf. 512; *Hoagland v. Williams*, 22 Iowa, 378; *Smoot v. Rea*, 19 Md. 398; *Snowman v. Harford*, 57 Me. 397.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. After this appeal had been perfected the appellants moved for an order directing the plaintiffs and respondents to satisfy the decree, on the ground that after the case was argued and submitted to the trial court, and while it was under advisement, the plaintiffs and Johnston voluntarily settled the subject matter of the litigation and canceled the contract upon which the suit is based, which fact was concealed and suppressed by the plaintiffs and their attorneys, and was not known to the defendants or the court below until long after the decree had been rendered. This is an appellate court, constituted and organized to revise and correct the proceedings of the trial court, when

regularly brought before it by appeal, and has no original jurisdiction, except such as may be incident to and in aid of its appellate powers: *Che Gong v. Stearns*, 16 Or. 219 (17 Pac. 871). Its inquiry is ordinarily confined to an examination of the record of the court below as embodied in the transcript, but where the appellant has, by some act of his, subsequent to the rendition of the judgment or decree appealed from, waived the right of appeal or otherwise terminated the controversy, such fact may be shown by evidence *dehors* the record, and the appeal will be dismissed because there is no longer any substantial controversy between the parties: *Ehrman v. Astoria Ry. Co.* 26 Or. 377 (38 Pac. 306); *Moores v. Moores*, 36 Or. 261 (59 Pac. 327).

2. But, where the relief sought is based on newly discovered evidence, the remedy is not by motion in this court, but by an original suit to vacate or annul the decree: *Nessley v. Ladd*, 30 Or. 564 (48 Pac. 420); *Hilts v. Ladd*, 35 Or. 237 (58 Pac. 32); *McLeod v. Lloyd*, 45 Or. 67 (75 Pac. 702). The facts upon which the motion in question is based are in the nature of newly discovered evidence, and the inquiry presented involves the consideration and decision of controverted questions of fact. The plaintiffs deny that any settlement of the subject matter of the litigation was ever made by them with Johnston. This question cannot be tried out on *ex parte* affidavits in this court, and the defendants' remedy, if any, must be found in some other proper proceeding.

The contention for the defendants is that a court of equity will not decree a specific performance of the contract in suit because (1) the plaintiffs have acted in bad faith and have been guilty of such laches and delay as will preclude them from relief in equity; (2) the defendant Johnston was solvent at the commencement of this suit and able to respond in damages for a breach of his contract and, therefore, plaintiff had a full and complete remedy at law; and (3) the court erred in allowing interest on the value of the hops from November, 1903, the time defendants deprived themselves of the power of specifically performing the contract by selling and disposing of the hops, and removing them from the jurisdiction of the court.

3. On the first point the argument is that although Johnston may be bound by his contract and liable in an action at law for damages for a breach thereof, the plaintiffs' conduct has been such that they are in no position to ask the aid of a court of equity to enforce specific performance of the contract against him or the other defendants who purchased the property *pendente lite*. If the plaintiffs have in good faith complied or offered to comply with their part of the contract, and Johnston was in fact insolvent at the time the suit was commenced, their right to a specific performance as against the defendants is settled by the former decision which has become the law of the case: *Livesley v. Johnston*, 45 Or. 30 (76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647). We are only to inquire, therefore, whether the evidence shows that plaintiffs have in good faith performed or offered to perform the contract on their part, and whether Johnston was in fact insolvent at the time the suit was commenced. By the terms of the contract the plaintiffs were required to advance to Johnston on or about April 1, 1903, the sum of \$336, with which to pay the rent on the hopyard occupied by him, \$250 "on or about April, May and June," for expenses of cultivating the hops, and, "at and during picking time of September," the sum of 4½ cents a pound for the expenses of picking. In compliance with their contract the plaintiffs did, on March 28, 1903, send to Johnston by mail their check for \$336, payable to the owners of the hopyard, and another check for \$250, payable to Johnston personally. These checks were sent in a letter to Johnston at Gervais, his post office address, as stated in the contract, but did not reach him until about the 1st of April.

On the 30th and 31st of March, and before the receipt of the letter containing the checks, Johnston started from his home near Gervais to Salem, the place of business of the plaintiffs, to obtain from them the advances as stipulated. While on his way and in the town of Gervais, he met Roberts, with whom he had some conversation, but not about the contract in suit. While traveling from Gervais to Salem on the train Johnston and Roberts had some controversy, which, soon after reaching the (48th Or.—4)

station, resulted in a personal encounter between them. They differ as to the cause and nature of the difficulty. Roberts says that while on the train Johnston approached him and said he was not going to live up to the hop contract and if the plaintiffs made any advances thereunder he would not use the money for the purposes stipulated and that the plaintiffs would have no recourse as he was insolvent. Johnston testifies that as the train approached Salem he was going through the cars, "having some fun with the boys," and Roberts asked him why he did not quit drinking, and he said he "would not quit for anybody, for he was having too much fun"; that after the train arrived at Salem Roberts again remonstrated with him about drinking and said that if he did not quit the plaintiffs would not advance any money under the hop contract; that he informed Roberts that the plaintiffs were "not the only men on the beach," whereupon Roberts struck him over the head with an umbrella and he returned the blow with his fist; that he returned home without calling at the office of the plaintiffs because he was afraid to do so.

On March 31st, the day of this difficulty, or the following day, the plaintiffs wired the bank at Woodburn, with which Johnston did business, stopping payment on their check for \$250 in Johnston's favor and at the same time wrote him that they had stopped payment on the check because in looking over the contract they had ascertained that "the advance was to be made on or about April, May and June," and not on April 1st as they originally supposed, but that they would "advance the money according to contract." On April 1st and before Johnston received this letter he called at the bank at Woodburn to cash the checks previously received by him from the plaintiffs, and was informed by the cashier, as he testifies, that payment of the checks had been stopped. He did not, however, present either of the checks, or request to see the telegram stopping payment on them, but immediately telephoned the defendants Wolf & Son and arranged with them to advance money with which to pay the rent on the hopyard. On the next day he returned the two checks to the plaintiffs and notified them that

he had elected to rescind the contract because of their failure to comply with its terms. He has ever since refused to recognize the plaintiffs' rights under the contract, although they notified him in writing on April 4th, April 16th, August 31st and September 8th, that they were ready and willing to comply with the contract and to make all advances stipulated therein, and did on April 4th offer in writing to pay the sum of \$250 for the expenses of cultivation and \$336 with which to pay his rent. On April 3d, Johnston borrowed from the defendants Wolf & Son money for rent and on the 10th of the next month contracted his hops to them and thereafter received from them advances from time to time to pay the expenses of cultivating and harvesting the crop, and after the preliminary injunction had been dissolved, sold the hops to them and they were shipped out of the State by the defendant the Southern Pacific Co.

It thus appears that plaintiffs tendered to Johnston the rent money before it became due and were at all times ready and willing to comply with their contract by making the stipulated advances. The only amount due on April 1, 1903, was the rent and a check sent in payment of it on March 28th was received by Johnston. No objection was made because the money was sent in the form of a check, and there is no pretense that payment of such check was stopped by the plaintiffs or that it would not have been paid had it been presented. The advances for cultivation were to be made "on or about April, May and June," and presumably as the same might be needed for the purposes stated. Payment was stopped of the \$250 check sent for such purpose because the plaintiffs believed the money was not then due, or because they supposed from Johnston's conduct that he might carry out his threat and misapply it. It was not because the plaintiffs did not intend to comply with their contract. In the letter to Johnston in reference to the matter it was expressly stated that the advances would be made "according to contract." If the plaintiffs were mistaken as to the proper interpretation of the contract and the money was in fact due on the 1st of April, a failure to make the advances on the exact day specified would not justify Johnston in rescinding the con-

tract if the plaintiffs were willing to make such advances as they were needed for cultivating purposes. There was, therefore, no such laches, delay or misconduct of the plaintiffs as will defeat this suit.

Where the party who applies for the specific performance of a contract has been guilty of laches and unreasonable delay, or has not acted in good faith, he will be denied relief: *Creath v. Sims*, 46 U. S. 192 (12 L. Ed. 110); *Kinney v. Redden*, 2 Del. Ch. 46, 54; *Benedict v. Lynch*, 1 Johns. Ch. 370 (7 Am. Dec. 484); *Conrad v. Lindley*, 2 Cal. 173. But this case does not fall within this rule. Much importance is given to the personal difficulty and encounter between Roberts and the defendant Johnston, but in our opinion it has but little, if any, bearing upon the merits of the present controversy. It certainly was no ground for the repudiation of the contract by Johnston, and it does not appear that the plaintiffs refused to perform their part of the contract on that account. There is no evidence that the plaintiffs intended to repudiate the contract because of this difficulty. It may be that on account of Johnston's conduct Roberts gave the terms of the contract a stricter and more technical construction than he otherwise would have done, and stopped payment on the check for advances because it was not then due, but it is clear that he intended to make further advances. If the plaintiffs had designed to repudiate the contract and not to be further bound by it, they most certainly would have stopped payment on the check for rent as well as the one for advances. The only security they had for the payment of either was the hop contract, and the right to deduct the several amounts from the stipulated price of the hops. It may be that Johnston supposed when informed by his banker that payment of the check had been stopped that the plaintiffs intended not to be further bound by their contract. He made no inquiry, however, to ascertain the truth of the matter, but immediately entered into negotiations with his codefendants Wolf & Son for money with which to pay the rent and the expenses of cultivating and harvesting his hop crop, and on the next day attempted to rescind the contract. It is undia-

puted from the testimony that Johnston was mistaken if he entertained the opinion that plaintiffs did not intend to comply with their contract and clearly his mistake did not justify him in repudiating it and is no defense to the relief sought by the plaintiffs in this suit.

4. On the question of Johnston's solvency but little need be said. At the time this suit was commenced he had no property outside of the hop crop of 1903, which is the subject matter of this controversy, and cannot be considered in determining the question of his solvency as it affects the jurisdiction of the court to enforce specific performance of the contract, except a lease of the hopyard for the years 1904, 1905, 1906 and 1907, and a house and 20 acres of land worth, as he testifies, about \$1,500. The lease was of an uncertain value and contained a stipulation that it should not be assigned or sublet without the consent of the lessors, and it is doubtful whether it could be seized or sold on execution at all. The other property was probably a homestead and not subject to seizure and sale under execution: B. & C. Comp. § 221. So that it is perfectly clear that an action at law against Johnston for breach of his contract would have been an inadequate remedy.

5. Interest was allowed by the court below, not as such, but as damages. The pleadings and evidence show that the hops were in the possession of the defendants at the time this suit was commenced, but that during its pendency Johnston and the defendants Wolf & Son, who purchased the hops of him, and the Southern Pacific Co. shipped them out of the State so that it is not possible for them now to specifically perform the contract. And where defendants thus deprive themselves of the power, during the pendency of a suit for specific performance, to perform the contract specifically, the court will retain jurisdiction to award the plaintiffs compensation in damages: *Waterman*, Spec. Perf. § 517; *Milkman v. Ordway*, 106 Mass. 232.

6. And the measure of damages in such case is the amount the plaintiff would have been entitled to recover in an action at law for breach of the contract.

7. In this instance such amount is the value of the hops at

the time of the breach, less what the plaintiffs were to pay for them, with legal interest thereon: 1 Sutherland, Damages (3 ed.), § 105.

It follows that the decree of the court below must be affirmed, and it is so ordered. **AFFIRMED.**

Decided 17 April, 1906.

COLES v. MESKIMEN.

85 Pac. 67.

EJECTMENT—RIGHT TO POSSESSION AS A DEFENSE.

1. A plaintiff in an ejectment action being required to show right to possession as well as title, any matter tending to show that defendant is not wrongfully in possession is a defense, whether the right asserted be legal or equitable, as, for instance, that defendant is holding under an executory contract of sale as to which he is not in default.

VENDOR AND PURCHASER—POSSESSION UNDER CONTRACT—WHEN DEFAULT MAY BE CLAIMED.

2. In a case where time is not made a vital feature of the contract, a purchaser who has entered into possession of land under an agreement to buy is not in default, so as to forfeit his right to occupation, by a failure to make the final payment, when the vendor has not tendered a deed.

From Baker: **SAMUEL WHITE**, Judge.

Statement by **MR. CHIEF JUSTICE BEAN**.

This is an action of ejectment by Elizabeth S. Coles against Stephen Meskimen. The plaintiff alleges that she is the owner in fee and entitled to the immediate possession of the property, and that the defendant wrongfully and unlawfully withholds the same from her. The answer admits the plaintiff's legal title, denies her right to the possession and the wrongful withholding by the defendant, and affirmatively alleges that on or about the 1st day of May, 1904, the plaintiff and defendant entered into an executory contract for the sale by the former and the purchase by the latter of the premises in controversy, together with a water right appurtenant thereto, for the sum of \$100, to be paid within one year; that by the consent of the plaintiff, and in pursuance of the contract, and in accordance with its terms, the defendant immediately entered upon the premises, and has ever since remained in possession thereof, making valuable and permanent improvements, of the reasonable value of \$300; that

on or about the 1st day of April, 1905, defendant tendered to plaintiff the full purchase price and demanded a deed, but plaintiff refused to execute or deliver such deed, and has never performed, or offered to perform, the contract on her part, although the defendant has been and now is able, ready and willing to pay the purchase price. The reply admits the making of the contract as alleged, except that it denies that a water right was to be conveyed with the land, and alleges that the purchase price was to be paid not later than September 1, 1904, and was not so paid or tendered by the defendant; that on April 5, 1905, the plaintiff offered in writing to convey the premises to the defendant upon the payment of the purchase price, and demanded such payment of him, but it was refused. The cause was tried to a jury. The plaintiff gave evidence of her legal title, waived her claim for damages, and rested. Thereupon defendant, to sustain his defense, gave evidence tending to prove the contract of purchase as alleged in his answer, his possession of the premises under such agreement, and the making of valuable and permanent improvements thereon of the reasonable value of \$300; that he offered to pay plaintiff the purchase price, but she refused to accept it, because she had no water right which she could convey; that plaintiff never offered or tendered defendant a deed as agreed upon, but on April 4, 1905, made him a written offer to deliver a deed, whereupon he again verbally offered to pay the purchase price pursuant to the terms of the contract, but that plaintiff refused to accept the same, because she said there might be \$30 or \$40 costs; that defendant did not have the money with him at the time these offers were made and refused, but he could and would have produced it if plaintiff had accepted such offers. The jury found from the testimony that plaintiff was not entitled to the possession of the premises, but that defendant was entitled to the same by reason of the contract set out in the answer. The plaintiff thereupon moved for judgment in her favor notwithstanding the verdict, on the ground that the matter set up in the answer did not constitute a defense. This motion was overruled, and judgment entered on the verdict, from which she appeals, assigning as

error (1) the overruling of her motion for judgment, notwithstanding the verdict, and (2) the refusal to instruct the jury:

"In order for the vendee to make a good and valid tender of the purchase price, the money sufficient to meet such purchase price must be actually present; in other words, the vendee must have had the money actually present with him at the time and place he claims to have made such tender."

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. John Bruce Messick*.

For respondent there was a brief and an oral argument by *Mr. William Smith*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The contention of the plaintiff is that under the facts set up in the answer the defendant's interest in the property in controversy is a mere equitable right and unavailing in an action at law. The well-established rule in this jurisdiction is that an equitable defense cannot be pleaded in an action at law, unless, perhaps, that right is given by B. & C. Comp. § 392, in actions to recover possession of real property—a question we need not now consider. An action of ejectment involves both the right of possession and the right of property. The plaintiff in such an action must recover, if at all, upon the strength of his own title. He must show not only that he has a legal estate in the property, but also a present right to the possession: B. & C. Comp. § 326. Any matter, therefore, which goes to disprove the fact of wrongful withholding is a legal defense, whether it shows the defendant's interest in the premises to be legal or equitable: *Newell, Ejectment*, 678; *Cofer v. Schening*, 98 Ala. 338 (13 South. 123). Thus, a mortgage in this State is a mere lien and does not convey the legal title, but possession of the mortgaged premises obtained by the mortgagee with the assent of the mortgagor is a good defense to an action of ejectment by the latter, so long as the mortgage debt remains unpaid: *Roberts v. Sutherlin*, 4 Or. 219; *Cooke v. Cooper*, 18 Or. 142 (22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709). In the federal

courts the common-law rule that the defendant cannot set up as a defense in an action matters purely cognizable in equity is adhered to, but facts which estop the plaintiff from claiming possession of the premises as against the defendant are held to be a good defense to an action of ejectment: *Kirk v. Hamilton*, 102 U. S. 68 (26 L. Ed. 79); *Killian v. Ebbinghaus*, 110 U. S. 568 (4 Sup. Ct. 232, 28 L. Ed. 246). Upon the same principle the rule seems established that a vendor of real estate cannot maintain an action of ejectment against a vendee in possession under an executory contract of sale who is not in default: *Warvelle, Ejectment*, § 146; *Prentice v. Wilson*, 14 Ill. 91; *Hutchinson v. Coonley*, 209 Ill. 437 (70 N. E. 686); *Whittier v. Stege*, 61 Cal. 238; *Crary v. Goodman*, 12 N. Y. 266 (64 Am. Dec. 506); *Bigler v. Baker*, 40 Neb. 325 (58 N. W. 1026, 24 L. R. A. 255). The answer, therefore, stated a good defense.

2. Error is also assigned on the refusal of the court to instruct the jury that the alleged tender or offer of performance by the defendant was unavailing, because he did not have the money actually present at the time. Under an executory contract for the sale of real estate, the vendor is the holder of the legal title as trustee for the vendee (*Burkhart v. Howard*, 14 Or. 39, 12 Pac. 79), and when the vendee has entered into possession under and in pursuance of the terms of the contract, the vendor cannot oust him so long as he is not in default; and when time is not made of the essence of the contract, he is not in default for failure to make the final payment until the vendor tenders a deed and demands such payment: *Knott v. Stephens*, 5 Or. 235; *Sayre v. Mohney*, 35 Or. 141 (56 Pac. 526). The question in this case, therefore, was whether the plaintiff, who is claiming a forfeiture of the contract, had herself performed, or tendered performance, and not whether the defendant had made a technical tender of the amount due. The delivery of the deed and the payment of the consideration were concurrent acts, and neither party could put the other in default without an offer to perform on his part: *Guthrie v. Thompson*, 1 Or. 353.

The judgment is therefore affirmed.

AFFIRMED.

Decided 1 May, 1906.

ENTERPRISE HOTEL CO. v. BOOK.

85 Pac. 333.

PLEADING—AVAILABLE ERROR—ADMISSIONS.

1. Error cannot be predicated on rulings of a judge following admissions in the pleadings, as, for instance, in admitting as evidence a contract on which the plaintiff counts and which the defendant admits having executed.

PRINCIPAL AND SURETY—PREMATURE PAYMENTS TO PRINCIPAL—DISCHARGE OF SURETY—WAIVER BY SURETY.

2. Where a security reserved in a building contract for the benefit of the sureties on the builder's bond is impaired by a premature payment to the contractor, the surety is discharged to the extent at least of the amount so paid unless the payment was made with the knowledge and consent of the surety; but this defense may be waived, and a stipulation in the contract that payments made at times or in a manner other than as stipulated in the contract shall in no wise operate to release the sureties from liability, amounts to a waiver of that defense by both the principal and the sureties: *Wehrung v. Denham*, 42 Or. 386, distinguished.

PRINCIPAL AND SURETY—EFFECT ON RIGHTS OF SURETIES OF ALTERING TERMS OF BUILDING CONTRACT.

3. A contract for the construction of a building having provided that if the owner should, during the progress of the work, request in writing any alterations, the same should be made and should not make void the agreement, but the value thereof should be added to or deducted from the contract price, and the bond having provided that any departure from the specifications, or alterations of the same should not make void the bond, the act of the contractor in making changes without requiring the requests therefor to be in writing, does not release either the contractor or his sureties. The provision requiring the requests for changes to be in writing was for the protection of the contractor, and he could waive it if he desired, thereby waiving it for the sureties also.

CONSTRUCTION OF BUILDING CONTRACT—PAYMENTS.

4. A provision waiving the exact performance of the terms of a building contract as to payments applies to the payment for extras as well as for the original work.

From Wallowa: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by the Enterprise Hotel Co. against Peter Book on a builder's bond. The complaint alleges that on July 29, 1902, the defendant Book contracted in writing with the plaintiff corporation to erect and construct for it by January 1, 1903, a two-story and basement stone hotel in the City of Enterprise, in accordance with certain plans and specifications, for the sum of \$7,366, and to keep the building and premises free from liens for labor or material; that as security for the performance of the contract, Book, as principal, and the defend-

ants Hallgarth and Bader, as sureties, executed and delivered to plaintiff the following bond or undertaking:

"Know all Men by These Presents, that Peter Book, of Elgin, Oregon, as principal, and Chas. Hallgarth and H. Bader, sureties, are held and firmly bound unto the Enterprise Hotel Company in the penal sum of seven thousand, three hundred and sixty-six dollars, for the payment of which in United States gold coin, we hereby bind ourselves, our heirs, administrators and executors firmly by these presents.

The Condition of the Foregoing Obligation is such that Whereas, said Peter Book and the said Enterprise Hotel Company have just entered into a contract whereby the said Peter Book has agreed and undertaken to furnish all of the labor and materials of every kind, and build and complete for the said Enterprise Hotel Company on or before the 1st day of January, 1903, a two-story and basement hotel building in the City of Enterprise, Wallowa County, State of Oregon, according to certain plans and drafts and explanations and the drawings and specifications prepared by Architect C. R. Thornton, which said plans, drafts, drawings and specifications are verified by the signatures of the parties to said contract and are by reference made a part of said contract; and Whereas, the said Peter Book has agreed to give security for the building and completion of said building according to the said contract therefor; and Whereas, the said Peter Book has agreed to save the said Enterprise Hotel Company free from all liens which may be filed or which may be enforced on account of materials furnished or workmanship employed or work done on or about said building and to pay for all materials furnished or work done, and to save the said Enterprise Hotel Company harmless from the payment of such liens or claims of lien:

Now, Therefore, if the said Peter Book shall furnish all of the materials and labor and build, construct and complete said building in all respects according to said contract and the plans and specifications referred to therein, and in all other respects comply with said contract, and will pay for all material and labor employed on said building or in its construction, and will not permit any person or persons to obtain any lien or liens upon said building for labor or materials furnished or to be furnished for said building and will save the said Enterprise Hotel Company harmless from any and all costs, charges, damages or attorney's fees from any such lien or liens or claims for liens, then this bond shall be null and void, but otherwise to be and remain in full force and effect and be liable to enforcement to the extent of all such costs, charges, damages and expense of

every kind which may be sustained by the said Enterprise Hotel Company by reason of the failure of the said Peter Book to comply with the terms of the said contract and this obligation.

It is Expressly Understood and Agreed that any departure from the plans, drawings and specifications, or if any additions to, or alterations of, or any omissions be made in said building, the same shall in no way affect or make void this undertaking, but the costs of the same shall be added to or deducted from the amount of said contract price of said building by a fair and reasonable valuation.

And it is Expressly Further Agreed and Understood that any extension of time in which to complete said building, or should any changes or deviations be made from said contract in respect to the payments therein stipulated to be made, or should payments be made at any other time or manner than therein stipulated, the same shall in no wise affect the validity of this obligation or release the sureties hereto from liability.

It is the intention of the parties to this undertaking to provide that any changes or alterations in the construction of said building or extension of time in which to construct the same, or change in the time or manner of making payment, shall not in any wise release the sureties hereto from their obligations on this bond.

This obligation and the contract referred to, which is hereto annexed, and made a part of this obligation, are to be construed to be one transaction and one obligation.

Witness our hands and seals in duplicate this 29th day of July, 1902.

Executed in the presence of	Peter Book.	[Seal.]
J. N. Hazelwood.	H. Bader.	[Seal.]
N. C. McLeod.	Chas. Hallgarth.	[Seal.]”

It is further alleged that Book did not complete his contract until July 1, 1903, by reason of which plaintiff was damaged in the sum of \$300, and that he suffered and permitted liens for labor and material amounting to \$2,969.94 to be filed against the building, which the plaintiff was compelled to, and did, pay. Judgment was demanded against the defendant Book and his bondsmen for the amount above set out, less \$728.97 retained by the plaintiff from the contract price.

The defendant sureties answered, denying all the material allegations of the complaint, and for an affirmative defense setting up the contract between the plaintiff and the defendant,

and pleading (1) that the delay in the completion of the building was due to the imperfect plans and specifications and the conduct of the plaintiff, and not the defendant Book; and (2) that the defendant sureties have been released and discharged from all liability under their contract because (a) payments were made by the plaintiff to Book at times and in amounts different from that stipulated in the contract; and (b) that changes and alterations were made in the work without the knowledge or consent of the sureties, which greatly increased their liability. A reply put in issue the new matter in the answer, and a trial resulted in a verdict and judgment in favor of plaintiff, from which the defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *Neil McLeod, F. S. Ivanhoe* and *Crawford & Crawford*, with an oral argument by *Mr. Francis Swift Ivanhoe* and *Mr. Thomas Harrison Crawford*.

For respondent there was a brief over the names of *Daniel Webster Sheahan* and *DePue & Cook*, with an oral argument by *Mr. Sheahan*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

There are numerous assignments of error, but they may all be grouped under three or four heads.

1. It is contended that the court erred in admitting in evidence the contract between the plaintiff and Book, and in refusing to direct a verdict for the defendants on account of a failure of proof. The contract in question and the bond heretofore set out are on one sheet of paper and were made up from printed forms. In the contract proper the contracting parties are referred to as the party of the first part and the party of the second part, and the names have been so transposed that, if the agreement is read literally and without reference to its context, it would appear as if Book owned the building and plaintiff was the contractor therefor. When the entire contract and bond are read together, it is apparent that the confusion grows out of a clerical error and the contract is in effect as alleged in the complaint. But, however that may be, the question is immaterial here

because the answer of the defendants sets up affirmatively the making of the contract, its terms and conditions, and pleads breaches thereof as a defense to this action, so that upon the pleadings there is no issue on that matter.

2. The contract provides that certain payments should be made to Book as the work progressed, and that \$1,000 should be paid to him on the certificate of the architect that the building had been completed according to the contract and had been accepted by the plaintiff. The building was not completed until July 1, 1903, and about that time the plaintiff paid \$1,000 to Book. The defendant sureties contend that they were released by reason thereof, because such payment was made without adjusting the claim for damages growing out of the delay in the completion of the building, and because there was at the time a mechanic's lien on the same for a small amount. The argument is that the reserve payments stipulated in the contract were for the benefit of the sureties as well as that of the owner, and that the payment in question operated to impair this reserve to the injury and prejudice of the defendants.

It is a settled rule of law that where a security reserved in a building contract for the benefit of the sureties on the builder's bond is lessened, impaired, or destroyed by a premature payment to the contractors, the sureties will be released and discharged to the extent at least of the amount so paid: *Cochran v. Baker*, 34 Or. 555 (52 Pac. 520, 56 Pac. 641); *Hand Mfg. Co. v. Marks*, 36 Or. 523 (52 Pac. 512, 53 Pac. 1072, 59 Pac. 549); *Wehrung v. Denham*, 42 Or. 386 (71 Pac. 133). But this doctrine can have no application where such payment is made with the knowledge and by the consent of the sureties: 27 Am. & Eng. Enc. Law (2 ed.), 495; *Brown Iron Co. v. Templeman*, 30 Tex. Civ. App. 50 (69 S. W. 249); *Smith v. Molleson*, 148 N. Y. 241 (42 N. E. 669). Now, in this case, the bond contains a provision that payments made at times or in a manner other than as stipulated in the contract shall in no wise affect the validity of the obligation or operate to release the sureties from liability thereon. It is plain that under this provision the sureties cannot complain because all payments were

not made at the time or in the manner stipulated in the contract, as they had waived that defense in advance.

3. The contract provides that if the plaintiff should at any time during the progress of the work request in writing any additions or alterations to the building, the same should be made and should in no way affect or make void the agreement, but the value thereof should be added to or deducted from the contract price, and the bond provides that "any departure from the plans, drawings and specifications, or if any additions to or alterations of, or any omissions be made in said building, the same shall in no way affect or make void this undertaking," and that "it is the intention of the parties to this undertaking to provide that any changes or alterations in the construction of said building * * shall not in any wise release the sureties hereto from their obligations on this bond." It is claimed that because certain changes and alterations were made in the building as the work progressed, such as increasing the height of the basement walls, the thickness of the exterior walls, the putting in of dormer windows and some work in connection therewith, a change in the painting specifications and the doubling of the first and second-story floors, were made without having been first requested in writing by the plaintiff, the sureties are discharged and released from liability.

It is an elementary rule of law that a surety can insist by his contract that he will not be bound except upon his own terms, and therefore, any alterations or additions in a building contract that materially change, vary, or increase the risk assumed by the sureties will release them from liability unless made by their consent, and there are authorities holding that where the contract provides that before the alterations or additions are made the value thereof shall be agreed upon in writing by the owner and the contractor that alterations or changes made by verbal agreement release the sureties: *Killoren v. Meehan*, 55 Mo. App. 427; *United States v. Freel*, 186 U. S. 309 (22 Sup. Ct. 875, 46 L. Ed. 1177). But there is no provision in the contract under consideration that the value of the alterations or additions should be agreed upon by the owner and contractor in advance. The

stipulation is that the same shall be added to or deducted from the amount of the contract price by a fair and reasonable valuation, and that if any dispute should arise concerning the value of any work or changes, the same should be determined by arbitration, and hence the authorities referred to are not in point here, and the liabilities of sureties are not affected by alterations and changes if consented to by them: *McLennan v. Wellington*, 48 Kan. 756 (30 Pac. 183); *Hayden v. Cook*, 34 Neb. 670 (52 N. W. 165); *De Mattos v. Jordan*, 15 Wash. 378 (46 Pac. 402); *Kretschmar v. Bruss*, 108 Wis. 396 (84 N. W. 429); *Hedrick v. Robbins*, 30 Ind. App. 595 (66 N. E. 704). The provision in the contract that if plaintiff should at any time during the progress of the work request in writing any alterations or additions the same should be made, was for the benefit of the contractor, and could be waived by him. If he saw proper to make any changes or alterations in the work when requested, without first requiring such request to be placed in writing, it would, it seems to us, constitute no defense for the sureties, nor release them from their obligations.

4. Again, it is contended that the value of any alterations or additions became a part of the contract price, and the amount thereof should have been retained by the plaintiff until the final payment. It is provided that the contract price shall be paid to Book in installments as the work progressed, and it is insisted that because the extra work was paid for from time to time as it was performed, that such payments were premature and operated to discharge the sureties, but, as we have already seen, the bond itself expressly provides that payments made at any other time or in any other manner than as stipulated, should in no wise affect the obligation of the sureties. It necessarily follows, therefore, that even if the defendants are correct in their interpretation of the contract, and that the payments for extra work should not have been made at the time the work was performed, nor until final payment on the building, the premature payment thereof did not release the sureties, or relieve them from liability.

This, we think, covers substantially all the questions raised on this appeal, and there being no error in the record, the judgment is affirmed.

AFFIRMED.

Argued 15 February, decided 17 April, rehearing denied 22 May, 1905.

ROBERTS v. TEMPLETON.

80 Pac. 481; 3 L. R. A. (N. S.) 790.*

STATUTE OF FRAUDS—CHANGE OF POSSESSION BY COTENANT AS PART PERFORMANCE OF ORAL CONTRACT.

Where a cotenant with a part owner of real property claims specific performance of an oral contract of purchase with another owner the proof must be clear that possession was taken under the oral agreement to constitute such a part performance as to avoid the statute of frauds.

For instance: Where plaintiff, up to the time of his oral purchase of the interest of a tenant in common in a mine, was in possession under a contract with a cotenant of the vendor, so that his prior possession merged into that under his purchase, there was not such a change of possession under the contract as to take it out of the statute of frauds.

From Lane: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by W. M. Roberts against the administrator and heirs of S. R. Templeton, deceased, to enforce the specific performance of an oral contract to convey an undivided share of real property. The complaint states that on June 28, 1902, S. R. Templeton was the owner and in the possession of an interest in the following quartz mining claims in Lane County, to wit, the undivided one fourth of the Excelsior, the Royal Ann, and the IXL, and also the undivided one fifth of the Tough Nut, in the Calapooia and Blue River Mining District, which on that day, in consideration of \$100, evidenced by a check for that sum, he agreed to convey by a good and sufficient deed to plaintiff, who then, with his consent, took, and ever since has retained, the exclusive possession thereof, and expended a large sum of money in developing the claims; that Templeton failed to execute the deed, and died intestate August 8, 1902, leaving the defendants as his heirs, who, upon a request therefor, refused to convey such interests to plaintiff, who has no adequate remedy at law for the irreparable injury he has sustained. The answer denies the material allegations of the complaint, and for a further defense avers that at the time the pretended agreement was consummated Templeton was seriously ill, and in consequence thereof his mind was so weak as to render him incompetent to

* See this case in 3 L. R. A. (N. S.) 790, 817, for a long note on Taking Possession of Real Property as Part Performance to Satisfy the Statute of Frauds.

REPORTER.

make a valid contract, which fact plaintiff then well knew, but, taking advantage thereof, induced him to enter into the simulated agreement; that on June 5, 1902, plaintiff, in pursuance of an agreement entered into with the owners of the mining claims, took possession thereof, and began to prospect them with a view of erecting a quartz mill thereon if he found gold in paying quantities; that the work he performed was done without compensation and in accordance with the terms of his agreement to develop the mines; that the check delivered to Templeton has never been presented for payment, and is deposited with the clerk for plaintiff. The reply put in issue the allegations of new matter in the answer, and, a trial being had, the suit was dismissed, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *N. M. Newport* and *B. S. Martin*, with an oral argument by *Mr. Newport*.

For respondents there was a brief over the names of *Woodcock & Harris* and *Amor A. Tussing*, with an oral argument by *Mr. Lawrence T. Harris* and *Mr. Tussing*.

MR. JUSTICE MOORE delivered the opinion of the court.

The trial court found that, though S. R. Templeton was ill when the oral agreement was entered into, he was nevertheless competent to make a valid contract, and in this conclusion we fully concur, without setting out any of the testimony in support thereof.

The only evidence offered tending to show the value of the interests in the mining claims, which the answer admits the deceased owned when the contract in question was entered into, was a copy of the inventory of his estate, showing an appraisement of such interests in the sum of \$250. The defendants' counsel did not call the appraisers as witnesses to prove their qualifications to express an opinion as to the value of such interests. Their estimate of the worth of the property as evidenced by the inventory cannot be much more competent than that of the county assessor, as noted in the assessment roll indicating his opinion thereof. If the undivided interests claimed by defendants as heirs were worth more than \$100, the sum agreed to be paid therefor, witnesses undoubtedly would have been

secured who would have so testified, but, in the absence of such testimony, we are satisfied that an adequate consideration was offered and accepted for the real property intended to be conveyed.

These preliminary questions having been settled in plaintiff's favor, the important question to be considered is whether or not his possession of the mining claims constituted such a part performance of the terms of the agreement as to take the case out of the statute of frauds. The weight of authority supports the doctrine that an oral contract to convey real property, entered into between cotenants, whereby the purchaser takes possession of the interest of his vendor in the premises, will not be specifically enforced in equity: *Pomeroy*, Spec. Perf. § 121; *Haines v. McGlone*, 44 Ark. 79; *Peckham v. Balch*, 49 Mich. 179 (13 N. W. 506); *Workman v. Guthrie*, 29 Pa. 495 (72 Am. Dec. 654); *Galbreath v. Galbreath*, 5 Watts, 146. The reason for this rule lies in the fact that possession of real property under an oral contract for its purchase must be exclusive to operate as a bar to the statute (*Hart v. Carroll*, 85 Pa. 508), and as the possession by a tenant in common is presumed to be in favor and for the benefit of his cotenants (*Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95), it follows that one cannot, by purchase, secure the interests of the others except by a writing evidencing a transfer of the title. It has been held, however, that where a cotenant owning a moiety of land receives from his cotenant the exclusive possession of the premises under an oral contract of purchase the specific performance of the agreement will be decreed: *Peck v. Williams*, 113 Ind. 256 (15 N. E. 270); *Littlefield v. Littlefield*, 51 Wis. 25 (7 N. W. 773). The cases to which attention has been called relate to the possession of real property taken by a cotenant in pursuance of an oral agreement to purchase the premises.

If, however, it be assumed that a stranger to the title can by such a contract take possession of an undivided interest in land, and enforce a specific performance of the oral agreement, we do not think plaintiff can exercise that right. The testimony shows that one A. C. Hausman, who was a tenant in common

with S. R. Templeton and others in the mining claims, entered into a contract with plaintiff whereby the latter was, without any payment to be made therefor, to prospect the mines for gold, and, if he discovered any, he had the privilege of erecting a stamp mill for the reduction of the ore to be extracted, and on the completion of the building furnished with suitable machinery he was to receive a deed conveying to him an undivided one half of the mining claims. In pursuance of this agreement, he, on June 6, 1902, began extending a tunnel into the IXL mine that had been commenced by the owners, and was working thereat June 29th of that year, when he entered into the contract with Templeton for the purchase of his interests in the mining claims. As a witness in his own behalf, plaintiff testified that he worked at the mine until Templeton became ill, when he sent word to Hausman that he would not do any more prospecting under the terms of their agreement, and that thereafter, having purchased Templeton's interests, he immediately took possession thereof, and began to develop the mines as the owner of such interests, extending the tunnel 30 feet and making a cross-cut in the mine of nine feet. On cross-examination defendants' counsel, referring to the contract entered into with Hausman, propounded the following question to plaintiff: "How long did you work under that agreement?" to which he replied, "Until I bought Mr. Templeton's interest." It further appears from the testimony that two days prior to plaintiff's purchase he sent a notice to Hausman of his intention to abandon the terms of their agreement. No evidence was offered tending to show that Hausman received such notice, and the fact that plaintiff continued developing the mine until he made the agreement with Templeton tends to show that he never surrendered his right of possession under the original contract with Hausman. To entitle a party to a specific performance of an oral contract to convey real property it must affirmatively appear that the possession was taken in pursuance of and under the agreement alleged in the complaint: *Brown v. Lord*, 7 Or. 302; *Sutton v. Myrick*, 39 Ark. 424. It will be remembered that plaintiff was in possession of the mining claims under the Hausman contract, and

that such possession was never relinquished, but merged into that assumed under the Templeton agreement. There was, therefore, not such a change of possession as to impart notice of plaintiff's right under the oral contract, and for this reason the decree is affirmed. **AFFIRMED.**

Argued 21 February, decided 22 May, rehearing denied 17 July, 1906.

JENNINGS v. JENNINGS.

85 Pac. 65.

AMENDMENT OF COMPLAINT—CANCELLATION OF INSTRUMENTS.

1. There is some question whether occurrences after the filing of a pleading should be presented by an amendment or by a supplemental pleading, but matters germane to the purpose of the first plea may be presented by amendment.

This is an illustration: A bill by a husband against his wife to set aside a deed to her averred that, prior to the execution of the deed, their relations were strained, without setting out the particulars thereof or the reasons therefor. It alleged that the deed was executed pursuant to defendant's promise that in such event she would resume marital relations with plaintiff, which she had no intention of doing, and which she absolutely refused to do as soon as the deed was made. Before answer plaintiff filed an amended bill in which he alleged defendant's relations with another and her unlawful association with him, and alleged an act of adultery committed after the filing of the original bill. *Held*, that the matters so alleged, being germane to the original cause of suit and admissible under the original bill, were properly introduced by amendment.

CANCELLATION OF DEED—FRAUD—FAILURE OF CONSIDERATION.

2. Where a wife, while estranged from her husband and in love with another, induced the husband to convey property to her on her representation that if he did so she would resume marital relations with him, which she had no intention of doing, and, on the execution of the deed, refused to keep her promise with the purpose of continuing her relations with such other person, the husband was entitled to a decree canceling the deed.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by O. O. Jennings against Helen C. Jennings to cancel and set aside a deed from the plaintiff to the defendant for lot 6, block 16, King's Second Addition to Portland. The original complaint was filed May 14, 1903, and alleged that plaintiff and defendant were husband and wife and had been since February, 1894; that in May, 1903, plaintiff was and for many years prior thereto had been a locomotive engineer and it was necessary for the proper transactions of his business that he

should live and reside at Roseburg; that for more than a year prior to May 7th, the domestic relations between him and the defendant had been greatly strained yet he had maintained a home in Portland, where his wife resided; that on the day named the defendant, for the purpose of cheating, wronging and defrauding him, promised and agreed that if he would deed to her the property in question which he owned at the time of his marriage, that she would remove from Portland to Roseburg and there live with him as his wife; that she had no intention of keeping such promise, but purposed thereby to wrong and defraud him out of the property; that relying upon the good faith of the defendant, he went to great expense in preparing a home in Roseburg, and deeded to her the property in dispute, but that immediately upon the delivery of the deed she absolutely refused to go to Roseburg and live with him and now asserts that she will never do so nor in any way keep or perform her promise and agreement, and refuses to redeed the property to the plaintiff; that in so inducing the plaintiff to deed her the property and in so refusing to go to Roseburg, the consideration for the deed failed, and the defendant has committed a fraud against the rights of the plaintiff.

Service was had upon the defendant but no appearance was made by her nor further proceedings had in the suit until June 11, 1904, when plaintiff, by leave of court, filed what he denominated an amended complaint, in which it is alleged:

"That the domestic relations between plaintiff and defendant had been greatly strained because of certain rumors which had come to plaintiff to the effect that the defendant, his wife, had been seen in the company of one J. S. Seed, a man of a notoriously bad moral reputation, yet, nevertheless, upon the said defendant protesting and asserting that her relations with said Seed were only those which any honorable woman and faithful wife might maintain, this plaintiff believing said protestation and assertions, and having confidence in the truth, chastity and loyalty of said defendant, had maintained and was maintaining a home in the said City of Portland; that on said 7th day of May, 1903, the said defendant for the purpose of cheating, wronging and defrauding this plaintiff, and protesting her love, affection and devotion for him, and avowing her acts to have

always been honorable, and especially her relations with the said Seed to have been ever proper and above reproach, promised the said plaintiff that if he would deed to her the above-described property she would immediately move to Roseburg and there keep and maintain the home and family relation with the plaintiff; that the defendant when she made said promise did not have, nor did she ever at any time have, any intention of keeping the same, but at said time, notwithstanding her said protestations and avowals, cherished a guilty love and affection for the said Seed, and had theretofore, together with said Seed, been caught at Second and Ash streets coming out of a lodging house at a late hour of the night by the wife of the said Seed, and was at said time severely beaten by the said wife of said Seed; intended and purposed by her said false promises and false protestations of love for plaintiff and her false assertions of honor, to cheat, wrong and defraud the plaintiff into executing said deed; that the plaintiff relying solely upon the good faith of his said wife in making said promise and agreement, and relying upon the truth of her said protestations and avowals, went to a great expense in securing a home in the City of Roseburg, Or., where the plaintiff and defendant and their son should reside, and depending solely and entirely upon the truth of said protestations and avowals and upon said promise to go to Roseburg and there keep a home for the plaintiff, the plaintiff made, executed and delivered to the defendant his certain deed to said property above described, which deed the said defendant then and there received and immediately caused the same to be placed of record in the proper office of said county.

(4) That immediately upon receiving said deed and placing the same upon record the defendant absolutely refused to go to said City of Roseburg as she had so agreed, and said she would never go there, notwithstanding that upon that consideration and no other, except as herein stated, said deed was given, and thereupon plaintiff demanded that said deed be surrendered and given up to plaintiff, which demand was refused.

(5) That at the time of making said protestations and avowals the said defendant was in love with the said Seed, and was lewdly associating with him, and has continued so to do in an open manner, and particularly on June 8, 1904, committed the crime of adultery with said Seed in the private lodgings of said Seed in Portland, Or.

(6) That said defendant in so inducing said plaintiff to deed said property to her, and in so refusing to go to Roseburg with plaintiff as aforesaid and in so refusing to deed said property back to plaintiff, committed a gross fraud against the rights of plaintiff.

(7) That by reason of the premises there has been a total failure of consideration of said deed and the same fraudulently secured from plaintiff; that had the plaintiff known the things done and purposed by the said defendant as aforesaid he would never have executed said deed.

Wherefore plaintiff prays for a decree of this court that the said defendant shall reconvey to this plaintiff said property, and for a decree canceling and holding for naught said deed from plaintiff to defendant, and that in the event of the refusal of said defendant to so redeed said property, that the decree entered herein may stand as and for said deed, and for such other and further relief as seems just and equitable to the court, and for his costs and disbursements."

The defendant moved to strike from the amended complaint the averment that she had committed adultery with said Seed in June, 1904, for the reason that such act occurred after the filing of the original complaint, and to strike out other allegations because they were sham, frivolous and irrelevant. This motion was overruled and the defendant answered, denying the material averments of the amended complaint and alleging affirmatively that she received the deed in good faith, intending to keep and perform her promise to go to Roseburg and live with the plaintiff as his wife, but that he refused to procure transportation for herself and son. The testimony was taken, and a decree rendered in favor of plaintiff, from which the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Dolph, Mal-lory, Simon & Gearin*, and *Julius Caesar Moreland*, with oral arguments by *Mr. Moreland* and *Mr. Cyrus A. Dolph*.

For respondent there was a brief over the name of *Bronaugh & Bronaugh*, with an oral argument by *Mr. Jerry England Bronaugh*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. It is argued that the court erred in overruling the motion to strike from the amended complaint the averment of matters happening after the filing of the original, for the reason that such matters, if proper at all, could have been presented only by supplemental complaint. As a general rule, facts occurring

after the filing of the original bill should be presented, when proper at all, by supplemental bill and cannot be introduced by amendment: 16 Cyc. 340. But this rule seems to be subject to the exception that if no answer has been filed at the time leave is granted, and amendment made, it is proper to allow matters arising after the original bill was filed to be added by way of amendment: Story, Equity (9 ed.), § 885; 1 Daniel, Ch. Pl. & Pr. *407. But whatever the true rule may be is unimportant in this case. The amended bill does not substantially change the cause of suit or introduce any matter arising after the filing of the original complaint, except the averment that defendant committed adultery with Seed in June, 1904, and this would have been competent as testimony under the averments of the complaint for the purpose of throwing light upon the method and purpose of defendant in securing the deed in question from the plaintiff. The original bill averred that the relations of plaintiff and defendant were strained at the time the deed was made, without setting out the particulars thereof or the reasons therefor. The amended bill, however, sets out these matters more in detail by alleging the relations of the defendant and Seed and her unlawful association with him and guilty love and affection for him. These were matters germane to the original cause of suit and were properly introduced by amendment.

2. The facts in the case require but a brief notice. No useful purpose would be served by embodying them in an opinion and thus making a public record of the details of the unfortunate estrangement and disagreement between plaintiff and defendant, and the cause thereof or of the circumstances under which the deed in question was made. It is sufficient that we have examined the record and are all of the opinion that the deed was obtained through fraud and deceit with no intent on the part of the defendant to keep and perform her promise, but with the design of abandoning the plaintiff after obtaining his property, and continuing her unlawful relations with her paramour, and that, under such circumstances, plaintiff is entitled to a decree as prayed for: *Dickerson v. Dickerson*, 24 Neb. 530 (39

N. W. 429, 8 Am. St. Rep. 213); *Meldrum v. Meldrum*, 15. Colo. 478 (24 Pac. 1083, 11 L. R. A. 65); *Evans v. Carrington*, 2 De G., F. & J. *481; *Evans v. Edmonds*, 76 E. C. L. 775.

The decree is therefore affirmed.

AFFIRMED.

Argued 5 Oct., decided 30 Oct., rehearing denied 4 Dec. 1905.

WELLS v. PAGE.

3 L. R. A. (N. S.) 103; 82 Pac. 856.

VENDOR AND PURCHASER—TENDER—FAULT OF VENDEE.

1. A vendor of real property, who is prepared to carry out his part of the contract, need not tender a deed or make an offer to perform, before suing the vendee for a breach of his contract to purchase, after the latter has repudiated the agreement.

VENDOR AND PURCHASER—BREACH BY VENDEE—ABILITY TO PERFORM.*

2. A vendor of real property desiring to claim a forfeit deposited by the other party to a contract for the sale of such property, must show that he is prepared to perform on his side, notwithstanding the purchaser refused compliance before the time for completing the transfer.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. JUSTICE BEAN.

This is an interpleader suit by Wells, Fargo & Co. against James E. Page and others. On March 14, 1902, Benson and Hyde and W. H. Gilbert entered into a contract in writing for the sale by the former and the purchase by the latter of 8,280 acres of land in the State of Washington. Benson and Hyde had no title at the time the contract was made, but the land had been selected by them, or for their benefit, under the provisions of the act of Congress of June 4, 1897, permitting the surrender of lands within forest reserves and the selection of other lands in lieu thereof. Under the rules and regulations of the Interior Department, no title vested in the selectors of such lands until the selections were approved by the Commissioner of the General Land Office. None of the selections which Benson and Hyde agreed to sell to Gilbert had been so approved at the time the

*NOTE.—See note to this case in 3 L. R. A. (N. S.) 103, collecting authorities and pointing out an unusual feature of this case. In 30 L. R. A. 33-73, is an extensive note, Right to Rescind or Abandon Contract Because of Other Party's Default, in which note pages 43, 48-49 and 64-66.

contract was made. This fact was recited in the agreement, and it was stipulated that, whenever the Commissioner should approve any of the selections, the title of the selector should be considered good and sufficient, and a deed from him, conveying all his interest and such as he might thereafter acquire, should be deemed a good and sufficient deed. It was further agreed that Gilbert should deposit with Wells, Fargo & Co.'s Bank in Portland \$10,000, which should be retained and held by the bank as a forfeit to Benson and Hyde in case of the failure of Gilbert to comply with the terms of his agreement, and from which the last payments on account of the purchase price of the land should be made, if the terms of the contract were kept and performed by Benson and Hyde; and that, if default should be made by Gilbert in the performance on his part of any of the conditions of the contract, the agreement of Benson and Hyde to sell and his right to purchase any of the lands for which payment had not been actually made, should cease and determine, and the forfeit money should thereupon become the property of Benson and Hyde, and the bank should pay it over to them. It was also agreed that in addition to the forfeit money Gilbert should at all times have on deposit with the bank \$10,000 with which to make the payments as they became due, and that when any of the selections should be approved, and Benson and Hyde should deliver to the bank a deed or deeds, in a certain form as agreed upon, conveying to Gilbert all the title, present and prospective, of the selectors, accompanied by evidence of the approval of the selections, the bank should pay out of the money deposited with it, exclusive of the forfeit money, to Benson and Hyde the purchase price. It was further stipulated that, if all the selections were not approved within one year from the date of the contract, it should be optional with Gilbert, either to cancel the contract or continue the same as to unapproved selections. Upon making the contract, Gilbert deposited with the bank the forfeit money as required, and also money with which to pay the purchase price of the lands as the deeds therefor should be delivered to it by Benson and Hyde; and thereafter, and prior to January, 1903, there were approved by

the Commissioner of the General Land Office selections covering 4,160 acres, which were conveyed to Gilbert and paid for by the bank. In September, 1902, the timber on the land mentioned in the contract was destroyed or injured by fire, and in January following Gilbert notified Benson and Hyde that he would decline to receive or pay for any more of the land, and demanded from the bank the return of the forfeit money. Benson and Hyde, without procuring or attempting to procure the approval of any more selections, or endeavoring to place themselves in a position to comply with the contract on their part, also demanded the forfeit money, and the bank, being in doubt, filed a bill in equity for a decree requiring Gilbert and Benson and Hyde and the defendant Page to interplead, paid the money into court, and was discharged from any further liability in the premises. Page's claim upon the forfeit money was settled, but Gilbert and Benson and Hyde filed appropriate pleadings setting up their respective claims, and upon a trial the money was decreed to be paid over to Gilbert, and Benson and Hyde appeal.

AFFIRMED.

For defendants and appellants, Benson and Hyde, there was an oral argument by *Mr. Albert Hawes Tanner*, with a brief to this effect.

I. Tender was unnecessary: *North v. Pepper*, 21 Wend. 636; *Gray v. Smith*, 28 C. C. A. 168 (48 U. S. App. 581, 83 Fed. 824); *Crary v. Smith*, 2 N. Y. 60; *Turner v. Parry*, 27 Ind. 163; *Gray v. Dougherty*, 25 Cal. 280; *Blunt v. Tomlin*, 27 Ill. 93; *Lyman v. Gedney*, 114 Ill. 408 (55 Am. Rep. 871, 29 N. E. 282); *Bucklen v. Hasterlik*, 155 Ill. 423 (40 N. E. 561); *Johnston v. Johnson*, 43 Minn. 5 (44 N. W. 668); *Hampton v. Speckenagle*, 9 Serg. & R. 212 (11 Am. Dec. 704); *Sweitzer v. Hummel*, 3 Serg. & R. 228; *McWilliams v. Brookens*, 39 Wis. 334; *Black v. Crowther*, 74 Mo. App. 484; *Galvin v. Collins*, 128 Mass. 525; *Curtis v. Aspinwall*, 114 Mass. 187 (19 Am. Rep. 332); *Carpenter v. Holcomb*, 105 Mass. 280.

II. The vendor of real estate may perfect his title at any time before the period fixed for the completion of the contract, and the fact that his title was incomplete at the time the contract

was made is immaterial: Sugden, Vend. & Pur. 8 Am. Ed. 396; Maupin, Marketable Title to Real Estate, 308, p. 741.

For defendant and respondent, Gilbert, there was an oral argument by *Mr. Harrison Gray Platt*, with a brief to this effect.

1. The evidence disclosed that Benson and Hyde could not make title to the lands which it is claimed Gilbert declared he would not accept. Gilbert is not liable in damages to Hyde and Benson because, as a matter of fact, Benson and Hyde were unable to comply with their part of the contract. The court will not mulct a party in damages for declaring that he would not accept and pay for property which the other party could not convey and deliver: *Bigler v. Morgan*, 77 N. Y. 312, 319; *McCann v. Albany*, 158 N. Y. 634, 639 (53 N. E. 673); *Sievers v. Brown*, 34 Or. 454, 460 (45 L. R. A. 642, 56 Pac. 171).

2. Where a party sells property which he is neither able to convey himself nor to compel a third person to convey, the purchaser, when he finds out the true state of facts, may repudiate the contract: *Brewer v. Broadwood*, L. R. 22 Ch. Div. 105; *Getty v. Peters*, 82 Mich. 661 (10 L. R. A. 465, 46 N. W. 1036); *Gerli v. Poidebard Silk Mfg. Co.* 57 N. J. Law, 432 (51 Am. St. Rep. 612, 30 L. R. A. 61, 31 Atl. 401); *Sievers v. Brown*, 34 Or. 454, 460 (45 L. R. A. 642, 56 Pac. 171).

3. The action of the officials of the Land Department of the United States in sustaining and rejecting the entries made on behalf of Hyde and Benson is presumed to be correct, being in performance of their official duty, until reversed or modified: B. & C. Comp. § 788, subds. 15, 20, 27, 34.

4. Even those courts which hold that an actual tender may be waived by a prior declaration that conveyance would be refused, expressly declare that to entitle a party to damages, who relies on such waiver, he must not only show the waiver, but he must also show that he was ready and had the present ability to convey according to the terms of the contract. Benson and Hyde alleged such ability, but entirely failed to prove it: *Nelson v. Plimpton Fire Proof El. Co.* 55 N. Y. 480; *Bigler v. Morgan*, 77 N. Y. 312-318; *Eddy v. Davis*, 116 N. Y. 247 (22 N. E.

362); *Baker v. The Bishop Hill Colony*, 25 Ill. 264; *Mix v. Beach*, 46 Ill. 311; *Wallace v. McLaughlin*, 57 Ill. 53; *Peck v. Brighton Co.* 69 Ill. 203; *Hale v. Cravener*, 128 Ill. 408 (21 N. E. 524); *Platte Land Co. v. Hubbard*, 12 Colo. App. 465; *Gray v. Smith*, 83 Fed. 824, 829 (28 C. C. A. 168); *Birge v. Bock*, 24 Mo. App. 330; 9 Cyc. 601.

MR. JUSTICE BEAN delivered the opinion of the court.

The money in dispute was the property of Gilbert, and was deposited with the bank by him. He is therefore entitled to its return, unless Benson and Hyde have a cause of action against him for default in the performance of the contract. He deposited the money as security for the performance of his contract, to be forfeited only in case of his default, and, whether it be regarded as liquidated damages, as security for actual damages sustained, or as a sum to be forfeited to the vendors in case of the vendee's default, is immaterial, unless he is liable for a failure to comply with the contract. It is shown by the record, and is admitted, that none of the selections which Benson and Hyde agreed to sell and convey to Gilbert, and which have not been accepted or paid for by him, had been approved by the Commissioner of the General Land Office at the time of the renunciation of the contract by Gilbert, nor were any of such selections thereafter approved during the life of the contract, or since, except one for 160 acres in May, 1903. All the other lands were either not open to selection, or had been abandoned by the selectors, or the selections had been rejected or suspended by the land department, or for some reason not approved, and there is no proof or showing that approvals could or would have been obtained but for the renunciation of the contract by Gilbert, except the mere opinion of Hyde, based on no substantial foundation, and for which he can give no sufficient reason. Of the land included in the contract 4,160 acres were conveyed to Gilbert and paid for, 240 acres were not open to selection and 40 acres were abandoned, leaving 3,840 acres, which it is claimed Gilbert refused to accept. Of this amount, the selection for 1,240 acres was rejected April 10, 1902, and was also included in the general order of November 21, 1902, suspending all

selections made by Hyde or in his name. The selection for 1,680 acres was suspended April 22, 1902, and was also included in the general order referred to, and this order, so far as the evidence shows, remains in full force and unrevoked. A selection of C. W. Clarke for 640 acres had been rejected prior to the making of the contract. An appeal was taken from the order of rejection and it was reversed on March 30, 1903, after the expiration of the time for performance. The selection of Clarke for 120 acres was not approved and the Commissioner called for additional evidence, and the selection for 160 acres was approved May 7, 1903. It thus appears that Benson and Hyde were at no time in a position, during the life of the contract, to require Gilbert to receive and accept the deeds, the delivery of which was made a condition precedent to the payment by him of the purchase price and necessary to put him in default. They did not own and could not have conveyed or caused to be conveyed the land which they had agreed to sell, and which Gilbert had agreed to purchase and pay for.

1. It is contended, however, that the renunciation of the contract, and the refusal of Gilbert to be bound by it, before the time for performance had expired, excused them from tendering the deeds or showing that they were in a position to complete the performance of the contract. Where either party to a contract gives notice to the other, before the time for performance has arrived, that he will not comply with its terms, the other is relieved from averring or proving tender of performance in an action thereon: 3 Page, Contracts, § 1436. Thus, where a vendor of real estate has title or ability to perform, and the vendee repudiates the contract before the time for performance has arrived, it is not necessary for the vendor to aver a tender or offer to perform in an action for a breach of the contract, because such a step would be but an idle and useless ceremony: 2 Warvelle, Vendors (2 ed.), § 757; *North's Admrs. v. Pepper*, 21 Wend. 636; *Johnston v. Johnson*, 43 Minn. 5 (44 N. W. 668).

2. But the waiver by refusal to perform goes only to the formal matter of the presentation or tender of a deed or demand

of payment; and a vendor of real estate cannot enforce the contract against a vendee who is in default or has repudiated it, unless he himself is in a condition to perform: *Sievers v. Brown*, 34 Or. 454 (56 Pac. 171, 45 L. R. A. 642); *Hampton v. Speckenagle*, 9 Serg. & R. 212 (11 Am. Dec. 704); *Bigler v. Morgan*, 77 N. Y. 312; *Gray v. Smith*, 83 Fed. 824 (28 C. C. A. 168); *Mix v. Beach*, 46 Ill. 311; *Wallace v. McLaughlin*, 57 Ill. 53; *Peck v. Brighton Co.* 69 Ill. 200; *Birge v. Bock*, 24 Mo. App. 330. In *Sievers v. Brown*, 34 Or. 454 (45 L. R. A. 642, 56 Pac. 171), the vendee refused to pay the first installment due on the contract, and the court said that his default did not authorize the vendor to declare a forfeiture until he himself was ready and able to convey the premises according to the terms of his bond. *Hampton v. Speckenagle*, 9. Serg. & R. 212 (11 Am. Dec. 704), was an action by a vendor to recover damages for the non-performance by a vendee of a contract to convey real estate which was incumbered in excess of the purchase price at the time the contract was made, but which incumbrances were not disclosed to the vendee. Before the time for performance arrived, the vendee denied having made the contract, and declared that he would not comply therewith. It was held that such renunciation by him excused the vendor from tendering a deed before bringing his action, but that, before he "would be entitled to recover damages, it was incumbent on him to show that it was not (sic) in his power to make a good title. He has averred in his declaration that he was ready to do all things necessary to be done on his part, and that averment cannot be supported, if he was unable to make title. If the incumbrances were of such a nature that the jury might be satisfied from the plaintiff's evidence that he could and would have removed them, had the defendant been willing to accept a conveyance, the case would fall within the principle of *McMurtie v. Bergasse*, and the plaintiff might recover. But the ability to discharge the incumbrances was a point which lay upon the plaintiff to establish beyond doubt. If he failed there, he could not be entitled to damages; but, if he satisfied the jury on that point, he might recover."

Bigler v. Morgan, 77 N. Y. 312, was likewise an action for the breach of an executory contract to exchange lands, and the court, speaking through Mr. Justice RAPALLO, says that, to entitle the vendor "to recover damages for a breach of the contract, he must show that he was ready and willing to deliver such a deed as the contract called for. The refusal of the defendant to perform, although it obviated the necessity of a formal tender of a deed, did not dispense with the necessity of showing that the plaintiff was able, ready and willing to perform; and ordinarily this requires that the deed called for by the contract should be prepared and ready for delivery." And after alluding to the distinction between an action to rescind a contract and recover back payments made thereon, and one to enforce it and recover damages, the learned justice continues: "However positively a vendee may have refused to perform his contract, and however insufficient the reason assigned for his refusal, he cannot be subjected to damages without showing that he would have received what he contracted for, had he performed." *Gray v. Smith*, 83 Fed. 824 (28 C. C. A. 168), was also an action of like character. The vendor did not have title to the property which he agreed to convey. Before the time for the completion of the contract, the vendee refused to abide by and repudiated it. The vendor claimed that such refusal excused him from showing his ability to perform. This position was thus disposed of by Mr. Justice GILBERT: "It is true that where the vendor of property, before the arrival of the time for the completion of his contract of sale or conveyance, disables himself from performing by disposing of the property to another, the purchaser may at once bring his action, and he need not aver or prove tender of the purchase money upon his part, nor his ability to carry out the contract; and, where either party to a contract gives notice to the other that he will not comply with its terms, the other is excused from averring or proving a tender of performance. But, in any case of action upon a contract, the elements of the plaintiff's damage must be certain, and the facts must exist from which it may be deduced that he has suffered loss. One

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who makes a contract to sell property of which he has no title, nor the certain means of procuring title, presents no facts upon which damage to him may be predicated, if the purchaser withdraws from the contract. The pleadings and the findings in this case leave it uncertain whether the plaintiff could ever have acquired title to the Market street lot. So far as the performance of his contract was concerned, he was in no better attitude than one who has disabled himself from carrying out a contract of sale by selling the property to another."

We are of the opinion, therefore, that Benson and Hyde are not entitled to the money in dispute, because they have not shown that they were able to perform the contract on their part. Gilbert's repudiation of the agreement before the time for performance had arrived would probably have excused them from making a formal tender of a deed; but it did not relieve them from showing an ability to comply with the contract, if they intended to put him in default, so as to entitle them to the forfeit money.

AFFIRMED.

Argued 20 February, decided 3 April, rehearing denied 17 July, 1906.

GASTON v. PORTLAND.

84 Pac. 1040.

WRIT OF REVIEW—FORM OF PETITION—ATTACHING EXHIBITS.

1. In view of the provision of Section 596, B. & C. Comp., that a petition for a writ of review shall describe with convenient certainty the determination sought to be reviewed, the petition should state such matters as are necessary, and copies of the record objected to should not be attached as exhibits—all that matter, and the expense of providing it, being provided for by Sections 598 and 599 of the Code.

WRIT OF REVIEW—PLEADING—DEMURRER—MOTION TO QUASH.

2. Under the practice in Oregon concerning writs of review as defined by Section 603, B. & C. C. Comp., requiring the court issuing the writ to affirm, reverse, modify or annul the decision reviewed, or to direct the inferior tribunal to proceed in a designated manner, the only pleading on the part of the defendants is a return to the writ, and it is not proper practice to file a demurrer to the petition or a motion to quash or dismiss. All objections and defenses should be presented in the form of a return to the writ, and the allegations of the petition are to be deemed true if the answer raises questions that would ordinarily be presented by a motion or demurrer.

MUNICIPAL CORPORATIONS—RIGHT TO RESELL LOTS ONCE SOLD UNDER VOID PROCEEDING—CAVEAT EMPTOR.

3. Section 400 of the Portland Charter of 1903, which authorizes the city to reassess property for public improvements in certain specified instances, does not authorize the city to sell under such reassessment where a sale was made under the prior assessment, even though such sale was entirely void, in the absence of a provision in the charter for returning the purchase price paid at the first sale.

IDEM.

4. That part of Section 400 of the Portland Charter of 1903, providing that where a sale has been declared void and the property shall be resold under a reassessment for public improvements, the entire proceeds shall be paid to the purchaser at the prior sale, is unconstitutional, as providing for a seizure of one man's property to give to another, in violation of Const. Or. Art. I, §18, which impliedly prohibits the taking of private property for private use at any price.

RIGHTS OF CONTRACTORS PURCHASING LOTS SOLD FOR PUBLIC IMPROVEMENTS—CAVEAT EMPTOR.

5. Contractors for public improvements who purchase property sold for unpaid assessments on their own work have no further rights than other persons purchasing under similar circumstances, and buy at their peril.

From Multnomah: MELVIN C. GEORGE and JOHN B. CLELAND, Judges.

Statement by MR. JUSTICE HAILEY.

The plaintiff Mary W. Gaston owns three lots in the City of Portland, abutting on Main Street, between certain points where the city made street improvements under the charter of 1898, and endeavored to assess each of her lots for its respective portion of the costs of such improvements. Plaintiff having failed to pay such assessments, the city sold her lots for the full amount of the assessments, under the provisions of the charter of 1903. She then brought suit against the purchasers of the lots, and had the assessment and sale declared void. Later, in 1903, the city, under the provisions of Section 400 of the new charter, attempted to make a reassessment of her lots for the same street improvements, and passed a resolution and ordinances for that purpose, and caused its proper officers to advertise that the lots would be sold as provided by the charter unless such assessments were paid within 30 days from the date of the notice. Plaintiff then filed this petition for a writ of review. Attached to and made a part of the petition are numerous exhibits which are copies of parts

of the proceedings of defendants sought to be reviewed. The petition was granted and a writ of review issued and served upon defendants, who made no return thereto, but filed general demurrers "to the petition and return, for the reason that the same do not state facts sufficient to constitute a cause of action." At the hearing it was stipulated in open court by the parties that the demurrers be considered and treated as motions to quash the writ of review, and after argument and consideration by the court the motions were allowed and an oral notice of appeal given by the plaintiff in open court, and this appeal perfected. REVERSED.

For appellant there was a brief and an oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief over the names of *L. A. McNary, City Attorney*, and *John P. Kavanaugh*, with an oral argument by *Mr. Kavanaugh*.

MR. JUSTICE HAILEY delivered the opinion of the court.

1. The practice pursued in this case of attaching to the petition a number of exhibits and treating them as the record of the proceedings to be reviewed we do not regard as being in accord with the intention of our Code providing for a writ of review. The sole virtue claimed for such procedure is economy; but this doubtful claim should not supplant the necessity for regularity in compliance with the provisions of our statute. Section 596 of our Code (B. & C. Comp.) clearly does not intend that the petition shall do more than describe with convenient certainty the decision or determination sought to be reviewed, and set forth the errors alleged to have been committed therein. Section 598 of the Code (B. & C. Comp.) provides that before allowing the writ an undertaking with one or more sureties, to be approved by the court, must be filed by the plaintiff, and the statutory amount of such undertaking is sufficient to protect the defendant in such a proceeding against all reasonable pecuniary expenses, and Section 599 provides for the return of the writ with a copy of the record or proceedings in question annexed, certified to by the clerk or

other person having the custody of such record or proceedings. This court in *Dayton v. Board of Equalization*, 33 Or. 131-139 (50 Pac. 1009, 1012), in speaking of the office of the writ of review under our Code, said: "It is substantially the common-law remedy by certiorari, which was invoked for the purpose of having the entire record of the inferior tribunal brought up for inspection, to determine whether it had jurisdiction or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of the law." The purpose of the writ being thus clearly defined, it would seem unnecessary to encumber the petition with numerous exhibits which are copies of the record or proceedings to be reviewed, and like copies of which are to be annexed to and returned with the writ.

2. No provision is made in our Code for filing any pleading after the order directing the issuance of the writ, except the writ itself, with the return of the defendants annexed thereto. There being no provision for a motion to quash the writ, it is doubtful whether such a motion will lie under our Code, for such a motion under the writ of certiorari was made for the purpose of dismissing the proceedings, whereas, under our practice, if the return shows the decision or determination reviewed to be proper, the court must affirm such decision or determination, and, if improper or void, the court must modify, reverse or annul such decision or determination, as the case may be, or by mandate direct the inferior court to proceed in the matter reviewed according to its decision: Section 603, B. & C. Comp.; *Woodruff v. County of Douglas*, 17 Or. 314-320 (21 Pac. 49). Thus, under our Code, the proceedings are not to be dismissed, but acted upon in accordance with Section 603, B. & C. Comp. There being no return of the writ, the demurrers can only be treated as motions to dismiss the petition for insufficiency of facts to warrant the issuance of a writ, and while we deem such procedure decidedly irregular and not warranted by our Code, inasmuch as the lower court and all parties have practically so regarded the demurrers, they will be so treated in this case, but not to serve as a precedent; the

proper procedure being, if such a motion to quash the writ is necessary or permissible under our Code, to file the same on the return day after the return of the writ: 6 Cyc. 16. Under such a motion to dismiss the allegations of the petition are taken as true: 4. Encyc. Pl. & Pr. 250. It will only be necessary, then, to ascertain whether or not the petition states facts sufficient to warrant the issuance of the writ.

3. The petition, after alleging the ownership of three certain lots in the City of Portland by plaintiff, and the corporate character of the city, and the official character of the other defendants, alleges that defendants, by the passage of certain resolutions and ordinances, and doing other acts, all of which are set out or referred to in the petition, assessed to plaintiff's lots certain sums mentioned therein for the cost of making certain improvements on Main Street, upon which said lots are located, and that such assessments were entered in the docket of city liens, and that, plaintiff having failed to pay such assessments, the lots were afterwards advertised for sale and sold by the city to J. Frainey and J. Keating on June 29, 1903, for the full amount of such assessment and all costs, interest and penalties, and return made of such sale to the proper officer. It is also alleged that thereafter a second delinquent list was obtained by the treasurer from the city auditor and a false return made thereon, to the effect that two only of plaintiff's lots had been sold and that the other lot had not been sold for want of bidders, which second list and false return thereon were substituted for said first list and true return, which latter had been removed and could not be found. It then alleges the adoption of a resolution by the council on October 5, 1904, directing the auditor of the city to prepare a reassessment on the lots of plaintiff and all other property within the district affected by that portion of Main Street where the improvements were made for which plaintiff's lots had been sold, which reassessment was based upon the provisions of Section 400 of the charter, providing that a reassessment may be made for the improvement of any street when "the council shall be in doubt as to the validity of such assessment,

or any part thereof"; and then alleges various acts of the defendants toward the perfection of such reassessment and the adoption of ordinances making such reassessment, and declaring the same a lien upon plaintiff's lots and authorizing the auditor to take the proper steps for the sale of such lots in case the payment of the assessment should not be made.

It then sets forth the errors alleged to have been committed in making such reassessment, and alleges that the defendants claim the right of selling plaintiff's property under the following portion of Section 400 of the Charter of the City of Portland:

"And when it has been attempted to sell property for any assessment and such sale is found or declared void, upon the making of the reassessment, the property shall be resold and the proceeds of such sale shall be paid to the purchaser at the former void sale or his assigns."

It is then alleged that this provision is in contravention of the constitution of this State, Art. I, § 18, in this: that it attempts to authorize the defendants to take private property without just compensation, and attempts to authorize defendants to take the private property of one person and give it to another person without the assent of the owner and without compensation. It also alleges that the defendants are without jurisdiction to reassess plaintiff's property by reason of the fact that such property has once been sold by the city for the full amount of the assessment levied against the same for the same improvements for the cost of which defendants are seeking to reassess it. Several other errors are alleged, but we deem it unnecessary to consider them. Several other allegations are made in the petition which we do not think can be considered at this time, as they are not material to the issuance of the writ of review, among them being the allegation that the sale of plaintiff's lots on June 29, 1903, was afterwards, by decree of the circuit court of Multnomah County, set aside and declared void, and the assessment upon which it was based also declared void.

It will be noted that the petition alleges the sale of plaintiff's

lots on June 29, 1903, for the full amount of the original assessment against them for the improvements on Main Street. In the case of *Dowell v. Portland*, 13 Or. 248 (10 Pac. 308), certain lots in the City of Portland had been assessed for street improvements and entered in the docket of city liens against a person who was not the owner of the lots, and were afterwards sold and the purchase price paid therefor. Such sale being void, it was contended on the part of the city that it had a right to reassess the property by making a correct entry in the docket of liens, and upon the failure of the true owner to pay the reassessment to sell the property. But the court held that, the property having been sold and the assessment paid into the city treasury, the power on the part of the city to sell had been executed and exhausted, and that the city had no power to reassess and resell the property of the plaintiff, and that the purchaser who had bought the lots at the void sale had done so under the doctrine of *caveat emptor*, and, there being no provision in the charter for refunding the purchase price to him, the city's claim against the lots for improvements was fully satisfied. The doctrine of *caveat emptor*, as declared in the above case, has since been followed by this court in *Keenan v. Portland*, 27 Or. 544 (38 Pac. 2), and *Gaston v. Portland*, 41 Or. 373-376 (69 Pac. 34, 445).

It is claimed, however, by the defendants that the doctrine of *Dowell v. Portland* has no application to this case, as the power to reassess is given by Section 400 of the charter of 1903, whenever the original assessment has been declared void, or the council has doubt as to the validity of the original assessment or any part thereof. This contention would no doubt be true if the city had not sold the property assessed for its claims for improvements, as the city would have the right to reassess and sell under Section 400 as long as its claim was unpaid by sale of the property or otherwise. If the doctrine of *caveat emptor*, as declared in the cases cited, still obtains under the present charter of the City of Portland, the city undoubtedly cannot resell the property for its own benefit after having once satisfied its claim for improvements by a sale of the property.

We find nothing in the charter authorizing the city to refund the purchase price to the purchaser at a void sale. Consequently the doctrine of *Dowell v. Portland* applies to like cases, unless it has been changed by that part of Section 400 authorizing the city to reassess property where a sale has been declared void, in which event "the property shall be resold and the proceeds of such sale shall be paid to the purchaser at the former void sale or his assigns." This provision clearly does not permit the city to resell for its own benefit.

4. The question, then, is whether or not the city has a right to reassess and resell the plaintiff's property for the benefit of the purchaser at the void sale. Section 412 of the charter provides:

"Each piece or tract of land shall be sold separately, and for a sum not less than the unpaid assessment thereon and the interest and cost of advertising and sale; and where there shall be more than one bid, the land shall be sold to the bidder offering to take the same for the least amount of penalty and interest."

Section 400 provides that reassessment liens shall be enforced and collected in the same manner that other assessments for local improvements are enforced and collected under the charter. Bearing in mind, then, that the proceeds of the resale shall be paid to the purchaser at the void sale or his assigns, and not to the city, and that there is no provision in the charter whereby a purchaser at a void sale shall be reimbursed for his purchase price other than receiving the proceeds at a resale upon a reassessment of the property, we have the peculiar condition existing under the provisions of this charter whereby upon a reassessment and resale of the property, if it should sell for a greater sum than the original purchaser paid at the first sale or for more than the amount of the reassessment, such purchaser would receive the entire proceeds of the resale, thus causing the owner of the property to pay him, not only the amount of his original purchase price, but all the excess of the second bid over such original price or reassessment. Such a procedure would compel the owner of property wrongfully sold to repay to the purchaser of his property, not only

the purchase price, but possibly many times that; for, upon a reassessment and sale, the irregularities of the first assessment and sale would presumably be cured and the property possibly sell for a better price by reason thereof. It in effect would sell the owner's property and give the proceeds to the former purchaser, to whom neither the city nor the owner owed any moral or legal obligation to pay anything. This, we think, cannot be done under our constitution, as it is clearly taking one man's property and giving it to another: *Witham v. Osburn*, 4 Or. 318, 322 (18 Am. Rep. 287). We therefore hold that the petition states facts sufficient to warrant the issuance of the writ, and that the motions should have been denied and a full return made upon the writ.

5. It is claimed by the defendants, also, that the purchasers, Frainey and Keating, having been the contractors who made the improvements upon the street for which the assessments were made against the plaintiff's property, should be considered more favorably than ordinary purchasers. This contention, however, has been decided to the contrary by this court in the case of *Keenan v. Portland*, 27 Or. 544 (38 Pac. 2).

The judgment of the lower court will therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

Argued 21 March, decided 10 April, 1906.

MARSDEN v. HARLOCKER.

MCPHERSON v. HARLOCKER.

85 Pac. 328.

ELECTIONS—REQUIREMENT OF NOTICE.

1. Electors are bound to take notice of elections regularly occurring in a prescribed manner according to law, and proclamations and other notices are not absolutely necessary; but in the cases of special elections at uncertain times or on particular subjects, all statutory provisions as to notice are mandatory, as, for instance, in reference to local option elections under Laws 1905, p. 41, c. 2.

INTOXICATING LIQUORS—WHO MUST ORDER ELECTION.

2. Under the provisions of Laws 1905, pp. 41, 50, c. 2, providing for the filing of a petition for an election as to the sale of intoxicating liquors, providing a method of determining whether the petition is signed by the requisite number of voters, and that the county court shall order an elec-

48	90
148	134
148	621

tion to be held if the petition is sufficient, it is imperative that the court determine the sufficiency of such petition, except the identity of the signatures, and order or refuse to order the election.

LOCAL OPTION—WHO CONSTITUTE COUNTY COURT—WHAT IS AN ORDER.

3. The "court" referred to in Laws 1905, p. 41, c. 2, § 1, conferring on a county court authority to order an election on the question of selling liquor in specified districts, is the body of persons designated by statute to sit in the capacity of a court, officially convened at a proper time and place; so, a memorandum signed at their homes separately by the members of the court is not an "order," not being made by the court.

ELECTIONS NOT INVOLVING OFFICE—EQUITABLE JURISDICTION.

4. Equity courts have jurisdiction to determine the legality of an election not involving an office, where no method of contest is provided by statute: *McWhirter v. Brainard*, 5. Or. 426, doubted and distinguished.

From Coos: JAMES W. HAMILTON and LAWRENCE T. HARRIS, Judges.

Statement by MB. JUSTICE MOORE.

These two cases were argued and submitted together. That of *Marsden v. Harlocker* is a suit in equity instituted November 22, 1904, by Robert Marsden against L. Harlocker, as county judge of Coos County, and E. A. Anderson and Lloyd Spires, as county commissioners thereof, to restrain them from canvassing votes cast at, and from declaring the result of, an election held November 8, 1904, to determine whether the sale of intoxicating liquors as a beverage should be prohibited in that county, and to enjoin them from making an order prohibiting such sales. The complaint alleges, *inter alia*, that plaintiff is a citizen, taxpayer and qualified elector of Coos County and engaged therein in operating a brewery, having about \$20,000 so invested; that on September 30, 1904, there was filed in the office of the county clerk of that county a pretended petition for an election to be held November 8th of that year, to determine whether the sale of intoxicating liquors should be prohibited in such county; that the county court thereof assembled in regular session at the courthouse therein, September 7, 1904, adjourning on the 12th of that month, and that at no time thereafter, prior to November 19, 1904, did such court again convene or make any order calling an election for the purpose specified; that by reason of the failure to give proper notice of the time and purpose of the proposed

election, the total vote cast thereat was 1,330 in favor of, and 1,220 against, prohibition, out of a total registration of 2,843, though for presidential electors at such election there were cast 2,840 votes; that the defendants, as such county court, are threatening to declare the result of the pretended election and to make an order prohibiting the sale of intoxicating liquors in Coos County, and, unless restrained from doing so, they will put their menace into execution, thereby destroying plaintiff's business, to his irreparable injury. A demurrer to the complaint, on the ground that it did not state facts sufficient to authorize the granting of the relief sought, having been sustained, and the plaintiff declining further to plead, the suit was dismissed and he appeals.

McPherson v. Harlocker is a writ of review to have the decision and determination of the officers of Coos County in the matter of the election referred to reviewed, vacated and annulled. The writ was denied, and the petitioner appeals.

REVERSED.

For appellants there were briefs over the names of *Coke & Seabrook* and *J. M. Upton*, with oral arguments by *Mr. Upton* and *Mr. John S. Coke*.

For respondents there were briefs over the names of *George M. Brown, District Attorney*, and *Bronaugh & Bronaugh* and *George F. Martin*, with an oral argument by *Mr. Earl Clapp Bronaugh*.

MR. JUSTICE MOORE delivered the opinion of the court.

It is contended by plaintiff's counsel that the failure of the county court of Coos County, as confessed by the demurrer, to order an election as prayed for in the petition therefor, rendered all the proceedings attempted to be had in pursuance thereof invalid, and, this being so, the court erred in not enjoining the defendants from invading the property rights of their client in attempting to put into execution such void proceedings. The record shows that though the county court of Coos County did not convene in regular or special session

within the time alleged in the complaint, the defendants, as members thereof, at different times and in various parts of the county, individually subscribed their names to a writing purporting to call an election to be held at the time and for the purpose specified in the petition, and this memorandum having been entered in the records of such court, it is maintained by defendants' counsel that the provisions of the local option act (Laws 1905, p. 41, c. 2) vest the county clerk of each county with judicial authority to determine the preliminary steps necessary to confer jurisdiction of the subject-matter, and that when he has exercised this power, the calling of an election in pursuance thereof by the county court is a mere ministerial duty, requiring neither discretion nor judgment, and such order may properly be made as in the case at bar, and therefore no error was committed as alleged.

The defendants' counsel, in support of the decree rendered herein, invoke the rule announced by a majority of the court in *People ex rel. v. Brenham*, 3 Cal. 477, where it was held that the time and place of an election having been prescribed by a city charter, the failure of the council to perform any duty required of them prior to an election should not defeat the choice of the electors when exercised in selecting officers for the municipality. We do not think the prevailing opinion in that case is founded in reason or supported by authority. The doctrine there promulgated has since been practically repudiated by the court making it. Thus, in *People v. Porter*, 6 Cal. 26, it was ruled that the proclamation of the Governor, required by statute, was necessary to the validity of a special election. In *People ex rel. v. Weller*, 11 Cal. 49 (70 Am. Dec. 754), it was decided that an election to fill a vacancy was invalid unless held under and in pursuance of the Governor's proclamation, which was mandatory and necessary to give notice to the electors that an election was to be held for such purpose. To the same effect are the cases of *People ex rel. v. Rosborough*, 14 Cal. 180, and *Kenfield v. Irwin*, 52 Cal. 164, in which latter case, Mr. Chief Justice WALLACE, speaking for the court, says: "The time of holding an election, whether general or

special, must be authoritatively designated in advance, either by law or by some means which the law has prescribed; otherwise the election is held without authority, and is ineffectual for any purpose."

1. In all general elections, the time, place and manner of holding which are prescribed by law, the rule is well settled that electors must take notice thereof, and as a corollary to this legal principle any requirement for the issuing of proclamations or the giving of other notice in respect to such elections must be treated as directory only: *McCrary, Elections* (4 ed.), § 185; *Stephens v. People ex rel.* 89 Ill. 337. In the case of special elections, however, all the statutory requirements as to proclamations or other means of giving notice are considered as mandatory and must be observed in order to render the vote of the electors participating therein valid: *People ex rel. v. Kerwin*, 10 Colo. App. 472 (51 Pac. 530); *Demaree v. Johnson*, 150 Ind. 419 (50 N. E. 370); *Morgan v. Gloucester City*, 44 N. J. Law, 137; *McHan v. Connell* (Tex. App.) 15 S. W. 284. Thus, in *State ex rel. v. Tucker*, 32 Mo. App. 620, it was ruled that an election under a local option liquor law, which could be held on the happening of certain conditions, was special, and that all the preliminary steps prescribed should have been taken in order to give validity to the election. To the same effect, in construing local option liquor acts, see *In re Sullivan*, 34 Misc. Rep. 598 (70 N. Y. Supp. 374); *In re Powers*, 34 Misc. Rep. 636 (70 N. Y. Supp. 590); *In re O'Hara*, 63 App. Div. 512 (71 N. Y. Supp. 613).

The reason for this rule rests upon the doctrine that suffrage is a valuable civil right, to the exercise of which each qualified person is entitled, and he must be given or charged with notice as to when, where and for what purpose he is to vote. If, by operation of law, the election invariably occurs at stated intervals, without any superinducing cause, except the efflux of time, the election is general, in which case all qualified persons are presumed to have knowledge thereof, and hence the failure of any officer or person upon whom the duty devolves to give a prescribed notice does not invalidate the votes cast thereat.

Where, however, some local project may be initiated by petition or other means, an election to determine whether such proposition shall be adopted is special, and the electors cannot be presumed to have knowledge of an application of the power which calls for the necessity of exercising the electoral franchise, in which instance a compliance with all the statutory requirements in respect to the performance of the conditions precedent is mandatory in order to validate the election.

The provisions of the local option act in this State (Laws 1905, p. 41, c. 2), so far as deemed involved herein, are as follows:

"Section 1. Whenever a petition therefor signed by not less than ten per cent of the registered voters of any county in the state * * shall be filed with the county clerk of such county in the manner in this act prescribed, the county court of such county shall order an election to be held at the time mentioned in such petition, * * to determine whether the sale of intoxicating liquors shall be prohibited in such county. * * In determining whether any such petition contains the requisite percentage of legal voters, said percentage shall be based on the total vote in such county * * for Justice of the Supreme Court at the last preceding general election; provided, that in no event shall more than five hundred petitioners, who are legal voters, be necessary upon any petition to require an election as herein provided.

Sec. 3. The petition therefor shall be filed with the county clerk not less than thirty nor more than ninety days before the day of election.

Sec. 6. The county clerk shall, upon receipt of such petition, immediately file the same and shall thereupon compare the signatures of the electors signing the same with their signatures on the registration books of the election then pending, or if nonpending then with the signatures on the registration books and blanks on file in his office for the preceding general election. If the requisite number of qualified electors shall have signed the petition, and if not inconsistent with the provisions of Sections 1, 12 and 14 of this act, he shall thereupon see that it is entered in full in the records of the county court as required by Section 1 of this act.

Sec. 12. If at any time an election hereunder shall result in prohibition for any subdivisions of county as a whole, or any precinct of said county, no election hereunder shall be held

within said prohibition territory except an election for the entire county before the first Monday in June of the second calendar year following, and not then unless petitioned therefor by the required number of legal voters and subject to the provisions in Section 14 of this act.

Sec. 14. When prohibition has been carried at an election held for the entire county, no election on the question of prohibition shall be thereafter held in any subdivision or precinct thereof until after prohibition has been defeated at a subsequent election for the same purpose, held for the entire county, in accordance with the provisions of this act."

2. It will appear from an examination of the excerpts quoted that the only duty specifically imposed on the county clerk of any county, so far as it relates to a prohibition petition, is to compare the names of the electors appended thereto with their signatures on the registration books or blanks, and if the application calls for an election for a subdivision of a county, he is required to see that the petition is entered in the records of the county court. Who is to determine whether or not the petition contains the requisite number of legal voters, and is otherwise sufficient, is not directly stated in the act under consideration. It would seem, however, that since the county court is required to order an election when a proper petition therefor has been filed, that, in the absence of any positive declaration on the subject, it must be incumbent upon such court to determine the preliminary questions involved as a condition precedent to making the order. As a petition is required to be filed not less than 30 nor more than 90 days prior to the day of election, ample time is thus given for making the application so as to secure an order at a regular session of the county court within the time prescribed.

We believe that a fair construction of the local option law, considered in its entirety, requires that after a county clerk has examined a petition for a prohibition election, compared the names subscribed thereto with the signatures of the qualified electors as they appear on the registration books or blanks, so as to identify the petitioners, it then becomes the duty of the county court to inspect such petition, and to examine its records to ascertain whether or not the application complies

with Sections 1, 12 and 14 of the act, and if the court concludes that these necessary requirements are fulfilled, it should order an election, which is tantamount to a proclamation authorizing the county clerk to issue notices thereof. As the right to vote upon the question of prohibiting the sale of intoxicating liquors is inaugurated by filing a petition, the election held in pursuance thereof is special, and hence the making of an order therefor by a county court, which in this particular respect at least requires an exercise of discretion and judgment, is mandatory and becomes a condition precedent to the holding of a valid election.

3. "A court," say the editors of the American and English Encyclopaedia of Law (Volume 8, 2 ed., p. 22), "may be defined as a body in the government, organized for the public administration of justice at the time and place prescribed by law." A court consists of persons officially assembled under authority of law at the appropriate time and place for the administration of justice: *Dunn v. State*, 2 Ark. 229 (35 Am. Dec. 54); *In re Allison*, 13 Colo. 525 (22 Pac. 820, 10 L. R. A. 790, 16 Am. St. Rep. 224); *Board of Commissioners v. Gwin*, 136 Ind. 562 (36 N. E. 237, 22 L. R. A. 402). Our statute observes the distinction usually recognized between a judge and a judicial tribunal, and provides that this officer may exercise out of court such powers only as are expressly conferred upon him: B. & C. Comp. § 933. The county court of Coos County did not meet in regular or special session, nor assemble at the time or place prescribed by law, and the memorandum signed by the defendants, purporting to authorize an election to determine whether the sale of intoxicating liquors as a beverage should be prohibited in that county, was not an order within the accepted meaning of that term. No election ever having been ordered, the votes cast in Coos County, November 8, 1904, upon the question attempted to be submitted, were nullities, and, such being the case, it remains to be seen whether a court of equity will grant the relief prayed for in the complaint.

4. The remaining question is one of remedy. The alleged threat of the defendants to canvass the vote cast, to announce
(48th Or.—7)

the result thereof and to prohibit the sale of intoxicating liquors in Coos County is as though they were about to order prohibition in force therein without observing any of the formalities prescribed by law as a means to that end. The rule is quite general that equity will not intervene when an adequate remedy is afforded at law, and hence in controversies involving the right to an office an injunction will not usually lie, because the parties have a complete remedy by statute to contest an election or by *quo warranto* to determine the right resulting therefrom. Where, however, an election relates to the adoption or rejection of some local question and does not include an office, it has been held in some jurisdictions, in the absence of any statute authorizing such proceedings, that equity would intervene to determine a contested election because of the irregularities or fraud in the conduct thereof: 10 Am. & Eng. Enc. Law (2 ed.), 816; High, Injunctions (4 ed.), § 1250. Thus, in *State ex rel. v. Eggleston*, 34 Kan. 714 (10 Pac. 3), which was a suit to enjoin county commissioners from canvassing votes polled upon the proposition of the relocation of a county seat, it was held that the relief sought should have been granted. In deciding the case Mr. Chief Justice HORTON, speaking for the court, says: "Counsel for the county board rely with a great deal of confidence upon the cases of *Moore v. Hoisington*, 31 Ill. 243, and *Dickey v. Reed*, 78 Ill. 261, to establish the doctrine that the canvass of election returns cannot be interfered with by an injunction. Both of these cases were proceedings for contesting elections. This is not a proceeding to contest an election, but to restrain the canvass of a vote upon the ground that the petition presented to the county board for the election was wholly insufficient because of the fact that certain names were by the signers requested to be withdrawn, and that some of the names signed were signatures of nonresidents, or other unauthorized persons. The petition alleges, in substance, that no election ought to have been ordered upon the petition, and that no election could have been legally held upon the petition, under the provisions of the statute."

It is contended by defendants' counsel that in *McWhirter v.*

Brainard, 5 Or. 426, a different rule was adopted in this State. In that case it was held that an injunction would not lie to restrain the removal of county offices to a county seat that had been relocated pursuant to a majority of the votes cast at an election held for the purpose, SHATTUCK, J., saying: "We think the matters of fact, which counsel claim should have been tried, do not constitute a cause of suit in equity—do not present a case wherein relief can be had by injunction. There is no special statutory provision for contesting an election for location of county seat; but we think when the question, in such a case, is the qualification of the voter, the conduct of the judges or the legality of the canvass, the proper remedy is by mandamus and not by injunction in equity." In *Robinson v. Wingate*, 36 Tex. Civ. App. 65 (80 S. W. 1067), in a well-considered opinion, it was ruled by the Court of Civil Appeals of Texas that equity had no jurisdiction to prevent by injunction the publication of the result of a local option election, on the ground of its invalidity or unfairness in conducting it, even at the suit of liquor dealers on allegation of irreparable injury to their property in case publication was made. In the case last cited, Mr. Justice GILL, referring to the Texas statute, which permits any qualified elector to contest a local option election (Rev. St. Tex. 1895, § 3397; *Norman v. Thompson*, 96 Tex. 250, 72 S. W. 62), says: "We think it follows logically and inevitably that a suit to contest the result of local option elections must be brought under the statute, and that a suit of this nature addressed to the general jurisdiction of the district court cannot be heard." It will thus be seen that the Texas court, observing the rule which prevails in all jurisdictions, denied injunctive relief, because the party alleging fear of injury from a proclamation of the result of a majority vote in favor of local option had an adequate remedy by statute for contesting the election. In *McWhirter v. Brainard*, 5 Or. 426, an injunction was denied because there was no special statutory provision for contesting an election for location of a county seat. We do not think the doctrine announced in that case can be predicated upon the reasons assigned, or that it is con-

trolling in the case at bar, no election contest being permissible except in case of persons claiming an office: B. & C. Comp. § 2839 *et seq.* It would seem, therefore, that equity has jurisdiction to afford the relief prayed for in the Marsden Case; but, however that may be, the same questions are presented in the review proceeding instituted by McPherson, and in any event are properly before the court for determination.

In view of the fact that the county court did not, as required by law, order the election in question, such election was invalid, and the judgment and decree of the court below are respectively reversed.

REVERSED.

Argued 28 Feb., decided 17 April, rehearing denied 22 May, 1906.

STRAUHAL v. ASIATIC STEAMSHIP CO.

85 Pac. 230.

TORTS—LIABILITY OF JOINT WRONGDOERS.

1. An action for tort may be brought against the wrongdoers either jointly or severally, independent of contract.

AMENDMENT—NEW CAUSE OF ACTION.

2. In an action for damages to the person alleged to have been caused by defendants jointly, an amendment alleging the employment of the person injured by one of the defendants alone, does not change the cause of action, it appearing from other allegations that the additional defendant owed the duty of not increasing the hazard of the injured person while in the performance of his duty.

EVIDENCE CONSIDERED.

3. The evidence shows negligence by the Oregon Round Lumber Co. and the Portland & Asiatic Steamship Co., but not by the Oregon Railroad & Navigation Co. and a nonsuit was properly granted as to the latter.

JOINT LIABILITY FOR CONCURRENT NEGLIGENCE.*

4. This is an example of a proper application of the rule that where an injury results from the concurring negligence of two or more persons, though acting separately, either or all are liable; viz: a barge owner having let it in an unseaworthy condition, retaining supervision over it, and allowed it to become waterlogged, and having sent deceased to work at the pumps, knowing the situation to be dangerous, but without warning

*NOTE.—With the case of *Village of Carterville v. Cook*, 4 L. R. A. 721, 16 Am. St. Rep. 250-257, are notes on Liability for Injuries in Case of Concurrent Negligence of Separate Parties. See, also, notes to *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, T. & Mfg. Co.* 17 L. R. A. 33, 35; *Wisconsin Cent. R. Co. v. Ross*, 34 Am. St. Rep. 49, 56, and *City Electric St. Ry. Co. v. Conery*, 54 Am. St. Rep. 262, 266.

With the case of *Add v. Northern Pac. Ry. Co.* 92 Am. St. Rep. 872-888, 54 L. R. A. 293-308, are monographs, Release of One Joint Tort-Ffeasor as Affecting the Liability of the others.

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him, is jointly liable in damages for his death by the capsizing of the barge with the lessee who improperly loaded and used such barge: *Smith v. Day*, 39 Or. 531, distinguished.

MASTER AND SERVANT—EVIDENCE OF ASSUMPTION OF RISK.

5. In an action for damages for wrongfully causing the death of one who was drowned by the capsizing of a barge on which he was at work under the direction and supervision of the owner, deceased being wholly inexperienced in water craft work, and not having been at all warned of the risk from the dangerous condition of the barge, the fact that stevedores working on the same barge were apprehensive of a disaster, and mentioned it in his hearing, is not sufficient to charge deceased with having assumed the risk of the employment, for it does not show that he knew the danger or the actual condition of the barge.

From Multnomah: JOHN B. CLELAND, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by B. D. Strauhal, as administrator of the estate of Otto Pannier, deceased, against the Oregon Railroad & Navigation Co., the Oregon Round Lumber Co., and the Portland & Asiatic Steamship Co., jointly, to recover damages for the death of his intestate, alleged to have been caused by the negligence of the defendants. The complaint, after alleging the death of Pannier, the appointment of plaintiff as his administrator, and the incorporation of the several defendants, avers that between the 24th and 28th days of December, 1904, the defendants were in the sole and exclusive use and possession of the river barge *Monarch*, which they were using in coaling river crafts of the Oregon Railroad & Navigation Co., and the steamship *Arabia*, belonging to the steamship company; that they carelessly and negligently loaded upon the barge a large amount of coal in excess of what it could safely carry in its then condition, and caused and permitted such coal to be loaded thereon in an improper manner so as to strain and weaken the barge, and render it unsafe; that while it was in such unsafe condition the defendants caused it to be taken to the *Arabia* and proceeded in a careless and negligent manner to unload and remove the coal therefrom, by reason of which the barge filled with water, capsized and the plaintiff's intestate, who was working thereon, drowned; that the barge was old, decayed and weak, and not sound nor safe for the use to which it was being put; that after it had been taken alongside the

Arabia, the deceased was employed by the defendants to assist in pumping the water from it and was so engaged at the time of the accident; that he was not accustomed to working on barges and had no knowledge or intimation that the barge in question was unseaworthy or had been improperly loaded or was then being negligently or unskillfully unloaded, or that there was any particular danger in his employment; that the place where he was put to work was one of extreme danger and known to be such to the defendants, notwithstanding which they neglected to inform him thereof.

The defendants answered separately. The Portland & Asiatic Steamship Co. alleged that at the times mentioned in the complaint it leased of the defendant, the Oregon Round Lumber Co., for the purpose of transporting coal to the steamship Arabia, then lying in the harbor, the barge Monarch, in charge of a barge master whose duty it was to superintend the loading and unloading thereof, to operate the pumps and to keep the barge free from water; that the barge was properly loaded and towed alongside the Arabia, but being in an unseaworthy condition, was taking water rapidly; and that the lumber company employed the deceased to operate the hand pump thereon, and while so engaged it capsized without any fault or negligence of the answering defendant. The Oregon Round Lumber Co. denied the allegations of the complaint and pleaded that at the time it rented the barge to the defendants, the Oregon Railroad & Navigation Co. and the Portland & Asiatic Steamship Co., it was in good seaworthy condition; that its codefendants had the sole and exclusive charge and management thereof and of its employee in charge, and so improperly and negligently loaded and operated the barge that it was greatly strained and weakened and caused to take water faster than it could be removed by the pumps; that the deceased was employed by it to pump water from the barge with knowledge of its weakened condition and that it was liable to capsize at any time and therefore assumed the risk incident to such employment. The Oregon Railroad & Navigation Co. denied the material allegations of the complaint and for an affirmative

defense pleaded substantially the same facts as are set up by its codefendant, the steamship company. Upon the issues thus tendered, the cause went to trial before the court and a jury.

The plaintiff gave testimony tending to show that on December 24, 1904, Capt. Conway, superintendent of water lines of the Oregon Railroad & Navigation Co. and the Portland & Asiatic Steamship Co., chartered of the defendant the Oregon Round Lumber Co. the barge in question for use in coaling the steamship Arabia then in port and belonging to the steamship company; that the barge was what is known as a "model" barge, and was equipped with a steam siphon and hand pump for use in removing the water; that at the time the barge was hired Conway was informed that he would have to be careful in loading and unloading it or it would open up and take water, and at his request the lumber company sent a man along as barge master, whose duty it was to report to his employer if the barge was not handled properly and to see that it was safely moored and kept free from water. The barge was taken by the lessee to the Albina Dock, and from 120 to 130 tons of coal loaded on the forward deck by the employees of the steamship company, on the 24th. The 25th and 26th being holidays, no work was done on either of those days, but on the morning of the 27th the loading was resumed and completed about noon of the 28th. During the morning of the 28th the barge master observed that it was taking water faster than it could be pumped out and about 11 o'clock attempted to reach the office of the lumber company by telephone to advise its officers of the condition of the barge, but was unable to do so. About noon on the 28th, and while the barge master was at his lunch, the barge was, by direction of the steamship company, towed from the coal bunkers to the Arabia and made fast. At this time there was a large quantity of water in the hold and it was taking water freely. When the barge master returned from his lunch he noticed a considerable list to port and that the barge was in a dangerous condition, and thereupon telephoned as soon as he could to the office of the lumber company, and O'Reilly, the superintendent, responded to the call and reached

the barge between 3 and 4 o'clock in the afternoon. At that time it was in a critical condition. It had several feet of water in the hold and was leaking badly and the stevedores had taken from 25 to 30 tons of coal from one corner and as a consequence it had listed so that the water was washing the deck on the off-shore side and midships. O'Reilly objected to the manner in which the barge was being unloaded, and in consequence thereof the stevedores commenced taking coal from the opposite side and the load was so shifted as to put the barge on an even keel, but the water was gaining on the pumps and O'Reilly telephoned for a steamer to assist in pumping. About this time, and while the barge was in this condition, he noticed the deceased standing on the wharf and asked him if he wanted to work, and being answered in the affirmative, O'Reilly directed him to report to the barge master, who put him to work at the hand pump on the forward deck. He worked there for about 45 minutes when the barge suddenly turned over, throwing him into the water and drowning him.

The deceased, so far as the evidence shows, had no experience in working on water crafts and was not informed or advised by O'Reilly, who hired him, or the barge master, who put him to work, or any one else, that the barge was in danger of turning over, or that there was any unusual risk or hazard in working thereon. The danger seems, however, to have been apprehended by the stevedores who were unloading and was several times mentioned by them in the hearing of the deceased, but it does not appear that he understood the purport of their remarks or was conscious of the danger. At the close of the plaintiff's testimony, he was permitted to amend his complaint so as to conform to the evidence, by changing the allegation that the deceased was employed by the defendants jointly to an averment of his employment by the defendant, the Oregon Round Lumber Co., alone. The defendants thereupon separately moved for nonsuits, which motions were sustained by the court, and the plaintiff appeals.

REVERSED.

For appellant there was a brief with oral arguments by *Mr. Enoch Burnham Dufur* and *Mr. Hayward Hamilton Riddell*.

For respondent Oregon Round Lumber Co. there was a brief over the name of *Hogue & Wilbur*, with an oral argument by *Mr. Ralph William Wilbur*.

For respondents Oregon Railroad & Navigation Co. and Portland & Asiatic Steamship Co. there was a brief over the names of *W. W. Cotton*, *H. F. Conner* and *A. C. Spencer*, with an oral argument by *Mr. Arthur Champlin Spencer*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. It was not error to allow the amendment to the complaint. It did not substantially change the cause of action. The action is not based on contract, but on tort, alleged to have been caused by the defendants jointly, and in such case a right of action exists against any or all of the wrongdoers, independent of contract: *Wabash, etc., Ry. Co. v. Shacklet*, 105 Ill. 364 (44 Am. Rep. 791).

2. The allegation of employment was merely to show that deceased was rightfully on the barge at the time of the accident and that the lumber company, his employer, owed him the duty of providing a reasonably safe place in which to work, or of warning him of the danger incident to the employment, and the steamship company, the duty of not increasing the hazard of his employment by its negligence.

3. There is no evidence in the record connecting the defendant the Oregon Railroad & Navigation Co. in any manner whatever with the accident which resulted in the death of plaintiff's intestate, and therefore its motion for nonsuit was properly allowed. It is true Capt. Conway, who hired the barge, was the superintendent of water lines of both the Oregon Railroad & Navigation Co. and the steamship company, and it is possible, although not clearly shown from the testimony, that the coal was taken from the bunkers of the former company, but this was not sufficient to make it liable for the condition of the barge or the manner in which it was loaded or discharged. The barge belonged to the defendant lumber company, was in the joint possession of it and the defendant steamship company, and was loaded by the latter either in its own way or as directed

by the barge master, a point upon which there is some conflict in the testimony, and there is evidence tending to show that it was not seaworthy and was improperly loaded. The witness Seaman, who had known the barge for six or eight months prior to the accident, was master of her for a time about the 1st of December, and who inspected her at the request of the officers of the lumber company, testified that she was an old craft; that her keel was broken in one place, and appeared to be rotten in others; that the two main braces had been pulled from the sides for about three inches and in his opinion the barge was not seaworthy for more than 300 tons, and he furthermore testified that he saw her the day of the accident after she had been loaded and that the load was not evenly distributed and so put an unusual strain on the barge. Dewyl, another witness, who had known the barge for 10 years or more and was foreman of her for some time, testified that he saw her as she was being towed from the dock to the Arabia and that she was loaded too heavily amidships; that such a load had a tendency to loosen the hog chains, open the seams and cause her to take water. When the barge was made fast to the Arabia, the water was coming in faster than it could be removed by the pumps and there was a considerable list to port. The steamship company, however, commenced discharging the coal from the starboard bow, which necessarily increased the list. When O'Reilly reached the barge he complained of the manner in which it was being discharged, and the foreman gave directions to have the coal removed as evenly as could be done and it was shifted so as to put the barge on an even keel, but by that time there was such a quantity of water in her that it was too late to keep her from capsizing.

4. There was evidence, therefore, tending to show that the accident by which the deceased lost his life was caused by the concurrent negligence of the steamship in loading and discharging the barge and of the lumber company in furnishing an unseaworthy barge, and in not keeping her free from water and in sending the deceased to work at a place known to it, but unknown to him, to be dangerous, without warning him of the danger. And this brings the case within the established rule

that where an injury is the result of the concurring negligence of two or more persons, although acting separately, either or all are liable: *Smith v. Rines*, 2 Sumn. 338 (Fed. Cas. No. 13,100); *Pirie v. Tvedt*, 115 U. S. 43 (5 Sup. Ct. 1034, 1161, 29 L. Ed. 331); *Wabash, etc., Ry. Co. v. Shacklet*, 105 Ill. 364 (44 Am. Rep. 791); *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481 (25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688); *Hawkesworth v. Thompson*, 98 Mass. 77 (93 Am. Dec. 137); *Cuddy v. Horn*, 46 Mich. 596 (10 N. W. 32, 41 Am. Rep. 178); *Slater v. Mersereau*, 64 N. Y. 138; *Brown v. Coxe* (C. C.), 75 Fed. 689; *Flaherty v. Minneapolis & St. L. Ry. Co.* 39 Minn. 328 (10 N. W. 160, 1 L. R. A. 680, 12 Am. St. Rep. 654); *Village of Carterville v. Cook*, 16 Am. St. Rep. 250, notes; *Gulf, Colo. & Santa Fe Ry. Co. v. Bell*, 8 Am. Neg. Rep. 159, 164, notes.

In *Smith v. Rines*, 2 Sumn. 338 (Fed. Cas. No. 13,100), Mr. Justice STORY says with reference to actions of this character: "Nothing is more clear, than the right of the plaintiff to bring an action of this sort against all the wrongdoers, or against any one or more of them, at his election. There is no principle, upon which the defendant has a right, in any court of justice, to say, that the action shall be several, and not joint; and thus to take away the right of election, which the plaintiff has by law, to make it joint." And in *Pirie v. Tvedt*, 115 U. S. 43 (5 Sup. Ct. 1034, 29 L. Ed. 331), Mr. Chief Justice WAITE says: "A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way." Judge SEAMAN says in *Brown v. Coxe*, 75 Fed. 689, that the creation of a joint liability in tort does not depend upon proof that the same act of wrongdoing was participated in by both tort-feasors and that they were in concert and had a common intent or were engaged in a joint undertaking: "But the rule under which parties become jointly liable as tort-feasors extends beyond acts or omissions which are designedly co-operative, and beyond any relation between the wrongdoers. If their acts of negligence, however separate and distinct in themselves, are concurrent in producing the injury, their liability is joint as well as several. Each becomes

liable because of his neglect of duty, and they are jointly liable for the single injury inflicted because the acts or omissions of both have contributed to it." *Smith v. Day*, 39 Or. 531 (64 Pac. 812, 65 Pac. 1055), is not in conflict with this doctrine. In that case the defendants were acting independently of each other, without concert or common purpose, and the injury was not due to their concurring negligence, although it may have been a common result to which the act of each contributed. To make tort-feasors liable jointly there must be some sort of community in the wrongdoing, and the injury must be in some way due to their joint work, but it is not necessary that they be acting together or in concert if their concurring negligence occasions the injury. "Where the negligence of two or more persons directly concurs to produce an injury to another," holds the Supreme Court of Illinois in *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481 (10 L. R. A. 696, 23 Am. St. Rep. 688, 25 N. E. 799), "although one may have undertaken one part of the particular work and another another part, and the negligence occurs in the performance of each of the several parts of the work which directly contributes to produce the injury, all will be liable." We are of the opinion, therefore, that the action can be maintained against the lumber company and the steamship company jointly. In such action a plaintiff may recover, if at all, against both or either of the defendants as the proof may warrant: *Thompkins v. Clay St. Ry. Co.*, 66 Cal. 163 (4 Pac. 1165); *Winslow v. Newlan*, 45 Ill. 145; *Carpenter v. Lee*, 5 Yerg. (Tenn.) 265.

5. It is contended that the deceased assumed the increased risk due to the condition of the barge at the time he went to work thereon, but there is no proof that he was conscious of the danger, or had knowledge of the fact.

The judgment is reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Argued 1 May, decided 3 May, 1906.

STATE ex rel. v. DUNBAR.

85 Pac. 337.

JURISDICTION OF EQUITY OVER POLITICAL QUESTIONS.

Equity will not undertake to control public officers in the discharge of political duties unconnected with rights of property.

For instance: An injunction will not issue to restrain the Secretary of State from printing on the ballots for an election the title of a proposed act in certain specified terms, the duty of the Secretary being entirely political and not involving property rights of any kind.

From Marion: WILLIAM GALLOWAY, Judge.

PER CURIAM statement.

This is a suit in the name of the State, on the relation of the Attorney General, against the Secretary of State, for the purpose, in effect, of striking from the ballot title of a proposed amendment to the local option law, to be voted on at the general election to be held on June 4, 1906, the following words: "Giving anti-prohibitionists and prohibitionists equal privileges"—and enjoining said officer from printing upon the ballots any more of the said proposed title than the words, "For amendment to the local option law." The complaint, after alleging certain matters of inducement, contains the following allegations as the gist of the suit:

"That the parties presenting and filing with said defendant the petition for the initiative referring said proposed purported amendment to said local option law to the electors of said State designated the following title to said measure to be printed upon the official ballot to be used at said general election, to wit: 'For amendment to the local option law and giving anti-prohibitionists and prohibitionists equal privileges.'

Fourth. That that part of said title so designated which reads, 'giving anti-prohibitionists and prohibitionists equal privileges, is not properly, fairly, or legally descriptive of said proposed purported amendment to the local option law, but, instead, is an argument in favor of said purported amendment, and is not at all descriptive of the subject or any of the subject-matter of said proposed bill, and does not describe or refer to anything in said proposed bill contained. That because said title, taken as a whole, is not properly, fairly, or legally descriptive of said proposed purported amendment, but an argument in favor thereof, and a conclusion indorsing the same, it is unfair, unjust, and wholly without warrant of law, and the printing

thereof upon the official ballot would unlawfully influence, mislead, and prejudice the electors at said general election and prevent an intelligent, fair, and true expression at the polls of the will of the people touching said purported amendment, to the great and irreparable injury of the State of Oregon.

Fifth. That said defendant, Hon. F. I. Dunbar, in his official character as Secretary of State, and in discharge of his ministerial duty as such Secretary, is about to furnish to the county clerks of the several counties of the State of Oregon his certified copy of said argumentative, unfair, and unlawful title taken as a whole, to be printed on the official ballot to be used at the ensuing general election to be held on the 4th day of June, 1906, to the prejudice of the electors and to the great and irreparable injury to the state.

Sixth. That plaintiff has no plain, speedy, adequate, and sufficient remedy at law."

The pleader then prays that defendant be restrained from furnishing his certified copy of that portion of the said proposed title embraced in the words, "giving anti-prohibitionists and prohibitionists equal privileges," or any more of said proposed title than the words, "For amendment to the local option law." To this complaint a demurrer was filed on the ground that the court had no jurisdiction of the subject-matter of the suit, and that the complaint did not state facts sufficient to constitute a cause of suit, which demurrer was sustained and a decree entered dismissing the complaint, from which decree this appeal was taken.

AFFIRMED.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, *C. M. Van Pelt* and *E. C. Bronaugh*, with an oral argument by *Mr. Cyrus Milton Van Pelt*.

For respondent there was a brief and an oral argument by *Mr. Ralph Elmo Moody*.

PER CURIAM. The question involved in this appeal is purely a political one and affects no property or civil rights, and, as stated by Chief Justice FULLER in *Green v. Mills*, 69 Fed. 852 (16 C. C. A. 516, 30 L. R. A. 90), "it is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circum-

stances and when necessary to the protection of the rights of property, nor in matters merely criminal, or merely immoral, which do not affect any right of property": *In re Sawyer*, 124 U. S. 200 (8 Sup. Ct. 482, 31 L. Ed. 402); *Luther v. Borden*, 48 U. S. (7 How.) 1 (12 L. Ed. 581); *Mississippi v. Johnson*, 71 U. S. (4 Wall.) 475 (18 L. Ed. 437); *Georgia v. Stanton*, 73 U. S. (6 Wall.) 50 (18 L. Ed. 721). "Neither the legislature nor the executive department," said Mr. Chief Justice CHASE, in *Mississippi v. Johnson*, "can be restrained in its action by the judicial department though the acts of both, when performed, are, in proper cases, subject to its cognizance." This is the well-recognized principle as announced by many of the highest tribunals of our states: *Fletcher v. Tuttle*, 151 Ill. 41 (37 N. E. 683, 25 L. R. A. 143, 42 Am. St. Rep. 220); *People v. Canal Board*, 55 N. Y. 393; *Smith v. Meyers*, 109 Ind. 1 (9 N. E. 692, 58 Am. Rep. 375); *Hardesty v. Taft*, 23 Md. 513 (87 Am. Dec. 584); *Sheridan v. Colvin*, 78 Ill. 237, in which case the court said: "It is elementary law, that the subject of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal, or merely immoral, which do not affect any right of property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of the government, except under special circumstances and where necessary for the protection of rights of property." To the same effect is High, *Injunctions* (4 ed.), §§ 20b, 1326. See, also, *People v. Mills*, 30 Colo. 263 (70 Pac. 322); *State v. Thorson*, 9 S. D. 149 (68 N. W. 202, 33 L. R. A. 582). And this court in the case of *State ex rel. v. Lord*, 28 Or. 498 (43 Pac. 471, 31 L. R. A. 473), has followed the same rule.

The court, therefore, having no jurisdiction over the subject-matter involved, the decree of the lower court should be affirmed; and it is so ordered.

AFFIRMED.

Argued 11 April, decided 12 June, rehearing granted 28 August, 1905;
reargued 27 March, finally decided 1 May, 1906.

SHARKEY v. CANDIANI.

85 Pac. 219.

**REFEREE—JURISDICTION TO TAKE TESTIMONY IN ANOTHER COUNTY—
WAIVER OF OBJECTION.**

1. Where a referee has without special authority taken the testimony of witnesses in another county than the one in which he was appointed, and more than 20 miles from the place of holding court, any objection to such testimony for want of jurisdiction in the referee to take it is waived by cross-examination.

MINES—CONCLUSIVENESS OF PATENT.

2. A patent from the United States for a mining claim is conclusive as to all facts necessary to establish the validity of the patent against adverse claimants.

EFFECT OF STATUTE REQUIRING NOTICE OF LOCATION.

3. Statutes providing for notices of mining locations, such as Section 3978, B. & C. Comp., are intended only as a means of determining the rights of conflicting claimants, and therefore it will be a compliance with such laws to make proper markings on the ground at any time before adverse rights attach.

WHO MAY QUESTION SUFFICIENCY OF LOCATION.

4. Only adverse claimants under a subsequent notice or notices can question the sufficiency of a location of a mining claim.

INITIATION OF VALID MINING CLAIM.

5. Under Section 2320, Rev. Stat. U. S., and Section 3975, B. & C. Comp., a valid right to a mining claim is initiated by the discovery by a qualified person of a vein of mineral-bearing rock in place on vacant land of the United States, and the appropriation thereof by such person by performing the acts prescribed in those statutes.

VALIDATION OF LOCATION BY SUBSEQUENT DISCOVERY OF VEIN.

6. A claim to mining ground void because no mineral vein was discovered thereon prior to the posting of notices of location, will be validated by a subsequent discovery of such a vein in place within such claim, if no adverse rights have accrued in the meantime.

RIGHT TO FILE ON PATENTED GROUND.

7. No location can be made on land already patented unless it has been abandoned so that it has again become part of the unappropriated public domain.

ESTOPPED BY ACQUIESCENCE—ABANDONMENT.

8. Where the persons in possession of a mining claim were experienced miners and familiar with the usual methods of marking the boundaries of mining claims, with which a subsequent adjoining locator was not familiar, and for many months saw such subsequent locator working on an adjoining claim without objection until he had expended a large sum of money and discovered valuable ore, when they claimed that he was trespassing on their prior location, are equitably estopped from maintaining such claim on the ground that they abandoned that part of the prior location overlapped by the subsequent locator, the means of information not being equal: *Ovatt v. Big Four Min. Co.* 39 Or. 118, distinguished.

WHAT CONSTITUTES ABANDONMENT.

9. No overt act is necessary to constitute an abandonment, it results from an exercise of the will.

EFFECT OF ABANDONMENT ON TITLE TO REALTY.

10. An abandonment of a claim to real property does not have the effect of transferring the title to any one.

NEED OF PROMPTNESS IN CLAIMING MINING GROUND.

11. The possible fluctuations in the value of mining claims resulting from discoveries on other claims render it important that claimants should promptly and continuously assert any rights they may think they have in locations, and a failure to resent with reasonable promptness a trespass on a located claim will be considered an abandonment of the ground actually occupied by the trespasser.

EXTENT OF RIGHT OF COTENANT TO ABANDON CLAIM.

12. Though ordinarily a cotenant cannot, without special authority from his cotenants, abandon any greater interest in property than he personally owns, yet, in the present case, the position and general supervisory power of the resident managing partner, and the kind of property involved, induce the holding that such manager had power to bind all the owners by his negligence in permitting a subsequent locator to trespass upon and improve part of their claim for so long a time.

From Lane: JAMES W. HAMILTON, Judge.

Statement by MR. JUSTICE MOORE.

This cause having been reargued, the opinion heretofore announced, which has not been published, will be changed to accord with the view now entertained. This is a suit by Frank C. Sharkey, Louis Zimmerman, Fred E. Sharkey, and N. B. Standish, against C. F. Candiani, Caesar Marco and J. J. Tyler, to determine the right of possession of certain mineral land. The complaint states that the defendants secured a survey of what they designated as the "Doctor" lode in the unorganized mineral district of Blue River, Lane County, and applied for a United States patent therefor, whereupon plaintiffs interposed an adverse claim to a part of the premises included in such survey, and instituted this suit, alleging, *inter alia*, that they were in possession of the Louise and Lucky Boy No. 4 quartz mining claims, which were prior locations, the validity of which had been maintained, detailing the manner thereof and showing wherein the Doctor lode conflicted with such claims. The answer having denied the material allegations of the complaint averred that plaintiffs had abandoned all interest in the premises inconsistent with the boundaries of the Doctor lode, and that by reason of their conduct they ought to be estopped to assert any claim thereto, setting out the facts which, it is asserted, constituted the alleged impediment which the law raises to preclude

the maintenance of this suit. The allegations of new matter in the answer having been denied in the reply, the cause was referred, and from the testimony taken the court found that the defendants, by reason of plaintiffs' conduct, were entitled to the possession of the premises in dispute, and having rendered a decree in accordance therewith, the plaintiffs appeal.

AFFIRMED.

For appellants there was an oral argument by *Mr. Zera Snow*, with a brief over the name of *Snow & McCamant*, urging these with other propositions.

I. The discovery of a vein of mineral bearing rock in place within the limits claimed is a condition of a lode location. Rev. Stat. U. S. § 2320; *Terrible Min. Co. v. Argentine Min. Co.* 89 Fed. 583; *Waterloo Min. Co. v. Doe*, 56 Fed. 689; *Nevada S. Oil Co. v. Home Oil Co.* 98 Fed. 677; *Ledoux v. Forester*, 94 Fed. 600.

II. In the absence of statute or local regulations defining what markings must be made, it is held that a claim otherwise regularly located must be marked on the ground so that its boundaries can be readily traced. Rev. Stat. U. S. § 2324; *Cheeseman v. Shreve*, 40 Fed. 787; *Doe v. Waterloo Min. Co.* 70 Fed. 458; *Ledoux v. Forester*, 94 Fed. 600; *Holland v. Mining Co.* 53 Cal. 149; *Geleich v. Moriarity*, 53 Cal. 217.

Where, however, a state statute or a mining regulation intervenes, compliance with such state statute must be shown, since the right of the state to so legislate has been uniformly upheld: *Northmore v. Simmons*, 97 Fed. 386; *Nevada S. Oil Co. v. Home Oil Co.* 98 Fed. 677; *Erhardt v. Boaro*, 113 U. S. 527; *Mining Co. v. Kerr*, 130 U. S. 256; *Kendall v. Mining Co.* 144 U. S. 664; *Sissons v. Sommers*, 24 Nev. 379 (55 Pac. 829).

III. A location once regularly made confers a right equivalent to patent, and every entry on such lands constitutes a trespass, and no location can be made by a trespasser. The pretended Doctor discovery was within the boundaries of the Louise location and therefore void: *Little Pittsburgh Co. v. Annie Min. Co.* 17 Fed. 57; *Aurora Hill Min. Co. v. 85 Min. Co.* 34 Fed. 515; *Erwin v. Perago*, 93 Fed. 608, 612; *Belk v. Meagher*, 104 U. S.

279, 284; *Guillim v. Donnellan*, 115 U. S. 45, 49; *McCulloch v. Murphy*, 125 Fed. 147, 153; *Seymour v. Fisher*, 16 Colo. 188 (27 Pac. 240).

IV. The Louise and Lucky Boy No. 4 locations were patented, moreover, and this is conclusive as to the discovery of a vein and the regularity of the location: *Calhoun G. & M. Co. v. Ajax Min. Co.* 182 U. S. 499, 509 (21 Sup. Ct. 885, 45 L. Ed. 1200); *Smelting Co. v. Kemp*, 104 U. S. 636 (26 L. Ed. 875); *Anderson v. Bartels*, 7 Colo. 256 (3 Pac. 225); *Iron Silver Min. Co. v. Campbell*, 17 Colo. 267 (29 Pac. 513); *Uinta Tunnel Co. v. Creede Mill Co.* 119 Fed. 164, 166 (57 C. C. A. 200); *Last Chance Min. Co. v. Bunker Hill & S. Min. Co.* 131 Fed. 579 (66 C. C. A. 299).

V. There is no room here for applying the doctrine of equitable estoppel, which takes the form of a claim of abandonment, for to say that there is vacant ground up the hill in a mining country to one who knows that several claims are already staked close to that spot, states nothing certain, nor any fact calculated to deceive a reasonably prudent man.

An equitable estoppel never arises where there has been a *bona fide* mistake of the parties as to the location of the true boundary of the true owner, even where improvements have been made in reliance on such mistake: *Boggs v. Merced Min. Co.* 14 Cal. 279, 366; *Maye v. Tappan*, 23 Cal. 306, 309; *Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co.* 51 Minn. 304 (53 N. W. 639, 641); *Proctor v. Putnam Mach. Co.* 137 Mass. 159, 162; *Iverson v. Swan*, 169 Mass. 582 (48 N. E. 282); *Mullaney v. Duffy*, 145 Ill. 559 (33 N. E. 750).

To constitute an estoppel by the acquiescence of a party it is essential that he who is claimed to be estopped should have had knowledge of the facts, and he who claims the estoppel should have been ignorant of the truth, and have been led into doing that which he would not have done but for such silence: *Bigelow*, Estoppel (5 ed.), pp. 609, 618, 626; *Mullaney v. Duffy*, 145 Ill. 559 (33 N. E. 750); *Iverson v. Swan*, 169 Mass. 582 (48 N. E. 282); *Wait v. Gover*, 11 Ky. Law Rep. 750 (12 S. W. 1068); *Commonwealth v. Moltz*, 10 Pa. 527, 532 (51 Am. Dec.

567); *Warner v. Fountain*, 28 Wis. 413; *Henshaw v. Bissell*, 85 U. S. (18 Wall.) 255, 271; *Brant v. Virginia Coal & Iron Co.* 93 U. S. 326, 336; *Schraeder Mfg. Co. v. Packer*, 129 U. S. 688 (9 Sup. Ct. 385).

Equitable estoppel never arises as between conflicting claimants of land where the means of information are equal to both parties: *Gleeson v. Martin White Min. Co.* 13 Nev. 442, 468; *Maye v. Tappan*, 23 Cal. 306, 309; *Mullaney v. Duffy*, 145 Ill. 559 (33 N. E. 751); *Iverson v. Swan*, 169 Mass. 582 (48 N. E. 282); *Crest v. Jacks*, 3 Watts, 238 (27 Am. Dec. 353); *Brant v. Virginia Coal & Iron Co.* 93 U. S. 326, 337.

For respondents there were oral arguments by *Mr. Charles Albert Hardy* and *Mr. Lark Bilyeu*, with a brief over the names of *Thompson & Hardy* and *L. Bilyeu*, urging, among others, these points:

1. A location may be based on a discovery on the outcrop of the vein (*Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075), and the discovery shaft need not be the shaft in which the vein is found: *O'Donnel v. Glenn*, 8 Mont. 248 (19 Pac. 302).

Moreover, a discovery after location, but before the intervention of adverse rights, validates the original location: *Zollars & H. C. Co. v. Evans*, 4 Mor. Min. Rep. 407; *Patchen v. Keeley*, 19 Nev. 404 (14 Pac. 347).

2. Proper marking of a location any time before the intervention of adverse rights is sufficient: *Crown Pt. Min. Co. v. Crismon*, 39 Or. 364 (65 Pac. 87); *North Noonday Min. Co. v. Orient Min. Co.* 9 Mor. Min. Rep. 539; *Jupiter Min. Co. v. Bodie*, 4 Mor. Min. Rep. 411.

3. Appellants had abandoned to respondents the ground embraced in the Doctor location and cannot be heard to assert a title they disclaimed. Any rights appellants may have had terminated when they located respondents on the ground and their acts and conduct thereafter are such that as far as respondents are concerned the ground embraced within the Doctor claim is as though appellants had never claimed to own or occupy it: *Golden Terra Co. v. Mahler*, 4 Mor. Min. Rep. 390; *Patterson v. Hitchcock*, 5 Mor. Min. Rep. 542; *Seymour v. Wood*,

53 Cal. 303; *Trevaskis v. Peard*, 111 Cal. 599 (44 Pac. 246); *Johnston v. Standard Min. Co.* 148 U. S. 360 (13 Sup. Ct. 585).

4. Appellants claim by prior locations and having abandoned the same and not claiming a relocation and there being no intervening rights the status of the Doctor location at the time of the commencement of the suit governs: *North Noonday Min. Co. v. Orient Min. Co.* 9 Mor. Min. Rep. 529; *Jupiter Min. Co. v. Bodie*, 4 Mor. Min. Rep. 411; *Golden Terra Co. v. Mahler*, 4 Mor. Min. Rep. 390; *Crown Pt. Min. Co. v. Crismon*, 39 Or. 364 (65 Pac. 87); *Brewster v. Shoemaker*, 28 Colo. 176 (53 L. R. A. 793, 89 Am. St. Rep. 188, 63 Pac. 309).

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is contended by plaintiffs' counsel that an error was committed in refusing to strike from the transcript much of the testimony given by defendants' witnesses, because it was taken out of the jurisdiction of the trial court, without an order to that effect. The statute authorizes a court, when a suit is at issue upon a question of fact, to refer the cause, and also to appoint a special referee for the purpose of taking testimony of witnesses residing more than 20 miles from the place of holding court: B. & C. Comp. § 827. This suit was begun and tried in Lane County, and the referee appointed therein, without an order of special reference, went to Multnomah County, where, over objection and exception of plaintiffs' counsel, the testimony of defendants' witnesses was taken. These witnesses, however, were cross-examined before such referee by plaintiffs' counsel, who thereafter, in Lane County, offered testimony in rebuttal thereof. In *Brush v. Mullany*, 12 Abb. Prac. (N. Y.) 344, it was insisted that a referee appointed in one county in New York could not, without special appointment, take the testimony of witnesses in any other county of that state, the court holding that an objection interposed on that ground went to the jurisdiction of the referee, and intimating that it was doubtful whether or not an indictment for perjury would lie against any of the witnesses who were sworn before him outside the county in which he was appointed. In that case, however, a default by all the defendants having been entered, the cause was referred

and the testimony taken in their absence, thus precluding the implication of a waiver. In *Blevins v. Morledge*, 5 Okl. 141 (47 Pac. 1068), an objection was interposed that a trial before referees was conducted outside the jurisdiction of the court, and it was held untenable where the point was not raised in the court below. It is fairly to be implied from the decision in that case that an objection to the taking of testimony by a referee outside the jurisdiction of the court appointing him could be waived by the parties. In New York a reference ordered by a court of special and limited jurisdiction requires the reference to take the testimony within such jurisdiction: *Bonner v. McPhail*, 31 Barb. (N. Y.) 106. Where, however, attorneys stipulate that a referee appointed by a surrogate in a county of that state may take the testimony of witnesses in another county therein, and an order to that effect is entered, it cannot be subsequently attacked, on the ground of a want of jurisdiction, by a party who appeared before the referee in such other county and there participated in the proceeding had therein before such referee: *In re Davenport*, 37 Misc. Rep. 90 (74 N. Y. Supp. 740). In the case at bar, though plaintiffs' counsel objected and excepted to the taking of the testimony by the referee in Multnomah County, they nevertheless participated therein by cross-examining the witnesses produced by the defendants. To strike from the transcript the testimony so taken would be to permit plaintiffs to speculate on securing a decree in their favor; but, failing in this respect, now to insist that an error was thereby committed, would be allowing them to take advantage of an irregularity which, in our opinion, they voluntarily waived, the want of jurisdiction being only to the person.

2. Considering the case on its merits, the transcript shows that prior to November, 1899, the plaintiffs and J. W. Moore and G. A. Dyson, as tenants in common, were in possession of the Louise and Lucky Boy No. 4 and other quartz mining claims in the Blue River District upon which improvements have been made of the value of about \$40,000, the property being treated as one mine, which is known as the "Lucky Boy Group," and was under the supervision of the plaintiff Frank C. Sharkey

as managing partner. A statement of the means adopted by plaintiffs to secure a title to their claims is not deemed essential, for a patent from the United States having been executed to them therefor, except as to the premises in conflict, is conclusive of all the facts necessary to establish the validity thereof as against a party claiming adverse rights: *Anderson v. Bartels*, 7 Colo. 256 (3 Pac. 225); *Iron Silver Min. Co. v. Campbell*, 17 Colo. 267 (29 Pac. 513); *Uinta Tunnel Co. v. Creede Mill Co.*, 119 Fed. 164 (57 C. C. A. 200); *Last Chance Min. Co. v. Bunker Hill & S. M. Co.* 131 Fed. 579 (66 C. C. A. 299); *Smelting Co. v. Kemp*, 104 U. S. 636 (26 L. Ed. 875); *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 499 (21 Sup. Ct. 885, 45 L. Ed. 1200).

The defendant Candiani having been advised by Zimmerman to go to the Blue River mining district and secure a quartz claim, accepted from him a letter of introduction which, in November, 1899, he presented at the mines to Frank C. Sharkey, who showed him and his associate, one G. B. Perelli, every attention possible. After remaining plaintiffs' guests several days, Candiani and Perelli went to a tunnel on one of the claims, known as the "Gold Dollar," where they saw Dyson, who, in answer to their inquiry as to whether or not there was any mining property that could be secured in that vicinity, informed them that vacant public land could be found just above the place where he was working, showing them the northeast and northwest corners of the Gold Dollar claim. Perelli, going a few feet north of the boundary of such claim, prospected the ground, and returning to the tunnel wrote a location notice, calling the premises the "Doctor" claim. Dyson signed his name as a witness to the notice, which was posted on the stub of a tree on the claim selected. The day being very stormy, Dyson agreed to mark on the ground the boundaries of the Doctor claim, and Candiani and Perelli in a day or two thereafter left the mines without informing the superintendent of the location they had made. Candiani, on returning to Portland, however, told Zimmerman that he had established a claim joining the Gold Dollar. In the winter of 1899 or 1900, Dyson and Standish made

some markings of the Doctor claim, for which service Candiani sent the former by Zimmerman \$10 in payment thereof, but when this money was delivered, Zimmerman did not know that Dyson had indicated any line on the Doctor claim.

The statute of this State in force when Candiani attempted to establish the Doctor lode required the locator of a mine, before the expiration of 90 days from the date of posting the notice of selection of mineral land, to sink a discovery shaft upon his claim to the depth of 10 feet, or deeper, if necessary, to show a vein of mineral deposit in place: Laws 1898, pp. 16, 17, § 3. No work having been done on the Doctor claim within the time prescribed, Candiani returned thereto and posted thereon another notice, of which the following is a copy, to wit:

"Notice is hereby given that Charles F. Candiani, a citizen of the United States of America, conforming to the mining laws thereof, and of the State of Oregon, and the local rules, regulations and customs of miners, has located, and by this notice do relocate, claim known as the Doctor lode or mining claim, said claim being discovered on the 16th day of November, 1899, and do claim 960 feet on this lead, lode or vein, bearing mineral in place, by 600 feet in width, the same being 300 feet on each side of the center thereof, together with all dips, spurs and angles and all other veins or lodes the top or apex of which lie within said boundaries, situate in Blue River Mining District, County of Lane, State of Oregon, said location being described and marked on the ground as follows, to wit:

From this notice of location running 300 feet in a westerly direction to a stake marked 'Southwest stake of Doctor lode'; thence 950 feet in a northerly direction to a stake marked 'Northwest stake of Doctor lode'; thence running 600 feet in an easterly direction to a stake marked 'Northeast stake of Doctor lode'; thence running 300 feet in a westerly direction to this notice of location.

This claim is joining the northeast line of the Gold Dollar claim, and is the extension of the same, and I intend to hold and work said claim in accordance with the local customs and rules of miners and the mining laws of the United States and of the State of Oregon.

Dated on the ground the 14th of February, 1900.

Located February 14, 1900.

Discovered November 16, 1899.

C. F. Candiani."

He also cut a tunnel into his mine, and prior to June, 1901, made other improvements on the property of the value of about \$8,000, when Frank C. Sharkey, having discovered that the Doctor lode conflicted with plaintiffs' mining claims, took possession of such tunnel and ejected Candiani from the premises, thereby precipitating a difficulty which resulted in this suit.

The statute of this state permits a citizen of the United States, or one who has declared his intention of becoming such, who discovers upon the unappropriated public domain a lode of mineral bearing rock in place, to locate a claim on the vein by posting thereon a notice which shall contain:

"First, the name of the lode or claim; second, the name or names of the locator or locators; third, the date of the location; fourth, the number of linear feet claimed along the vein or lode each way from the point of discovery, with the width on each side of the said vein or lode; fifth, the general course or strike of the vein or lode as nearly as may be."

A locator is also required to define

"The boundaries upon the surface of each claim so that the same may be readily traced. Such boundaries shall be marked within thirty days after posting such notice by six substantial posts, * * or by substantial mounds of stone, * * one such post or mound of rock at each corner and at the center ends of such claims": B. & C. Comp. § 3975.

"Any and all locations or attempted locations of quartz mining claims within this state subsequent to the 31st day of December, 1898, that shall not comply and be in accordance with the provisions of this act shall be null and void": B. & C. Comp. § 3984.

An examination of the last notice posted by Candiani will show that it fails in many respects to comply with the statutory requirements, and evidently omits to designate the eastern boundary of the Doctor claim.

3. The trial court, *inter alia*, found, and we think the conclusion is fully warranted by the testimony:

"That no markings of the Doctor claim for the purpose of marking out on the ground the boundaries thereof was ever made until the time of the survey for patent, other than such as was made by Dyson and Standish in December, 1899."

Though our statute has prescribed certain conditions which must be performed in order properly to locate a mining claim,

and provided that a failure to comply therewith should annul every attempted location, the enactment was evidently designed as a guide only, to determine the rights of conflicting claimants, thus permitting the proper marking of a location at any time before adverse rights attach: *McGinnis v. Egbert*, 8 Colo. 41 (5 Pac. 652); *Jupiter Min. Co. v. Bodie Min. Co.* 4 Mor. Min. Rep. 411; *North Noonday Min. Co. v. Orient Min. Co.* 9 Mor. Min. Rep. 529; *Crown Pt. Min. Co. v. Crismon*, 39 Or. 364 (65 Pac. 87).

Unappropriated lands of the United States containing valuable deposits of mineral are subject to exploration, occupation and purchase, under regulations prescribed by law, so far as the same is applicable and not inconsistent with the acts of Congress: Rev. Stat. U. S. § 2319 (U. S. Comp. St. 1901, p. 1424, 5 Fed. Stat. Ann. 4). In commenting upon legislation which the act of Congress of July 4, 1866, authorizes, Mr. Lindley, in his work on Mines (2 ed. § 249), says: "If the state may prescribe any additional or supplemental rules, increasing the burdens or diminishing the benefits granted by the federal laws in land of the public domain, it is simply because the government, as owner of the property, sanctions, expressly or by implication, the exercise of such powers." This author, in discussing the necessity for a substantial compliance with the requirements of the acts of Congress in respect to securing public land containing valuable mineral deposits, and of legislation by the states supplemental thereto, which are treated as conditions precedent to the completion of a valid location, further observes: "The order in which the several acts required by law are to be performed is nonessential, in the absence of intervening rights." Lindley, Mines, § 330. In *Sisson v. Sommers*, 24 Nev. 379 (55 Pac. 829, 77 Am. St. Rep. 815), it was held that a failure substantially to comply with the provisions of a statute of Nevada, which required a locator of a mining claim to sink a discovery shaft within a prescribed time after posting a notice of location, forfeited the rights of the locator, whether or not the statute contained a clause to that effect. In deciding the case, the court, referring to the federal and to the state laws and to the rules

and regulations of miners relating to the steps necessary to be taken to secure a mining claim, say: "Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for noncompliance or not, and the mining claim becomes subject to location by any qualified locator." As a forfeiture results from a failure substantially to comply with the requirements of a state statute prescribing the method to be pursued to obtain a mining claim, whether or not such statute so declares the penalty, the clause of our law (B. & C. Comp. § 3984), providing that any attempted location of a quartz mining claim that shall not be in accordance therewith shall be null and void, adds nothing to the enactment which would be so construed in the absence thereof, in case of adverse claimants.

4. State legislation supplemental to the acts of Congress, which prescribes the method to be pursued by a locator as a condition precedent to making a valid appropriation of the public lands of the United States, containing valuable mineral deposits, is designed as a rule of evidence only, to determine the rights of an adverse claimant of the premises, under a subsequent location thereon of a mining claim. This must, upon principle, be the object of such laws, otherwise the enactments, in case no adverse claim is interposed, would be an interference with the primary disposal of the soil by a state, which is inhibited by the enabling act by which it became a part of the Union. Congress has impliedly invited miners to adopt rules and regulations and, in the same manner, requested state and territorial legislatures to enact laws protecting the rights of claimants of mineral lands, which rules and laws are recognized, when not in conflict with the federal statute, and enforced by the courts in cases involving a contest. The right of the defendants to the Doctor claim depends upon acts of the plaintiffs, constituting an alleged equitable estoppel, tantamount to an abandonment, and, as the plaintiffs did not make a subsequent location of the premises, we do not think they are in a position to insist upon a strict performance of the state statutory requirements by the defendants, whose rights, if they exist, must rest upon the alleged abandonment.

5. It is the discovery by a qualified person of a lode or vein of mineral bearing rock in place, on the vacant land of the United States, and the appropriation thereof, evidenced by posting a notice, and recording the same when so required, and by marking on the ground the boundaries so that they may be readily traced, that initiates a valid mining claim, the right to the continued possession of which is maintained by annually performing the work prescribed for its development, until a patent has been secured: Rev. Stat. U. S. § 2320 (U. S. Comp. St. 1901, p. 1424, 5 Fed. Stat. Ann. 4); Laws 1898, p. 16, § 1; B. & C. Comp. § 3975; *Jackson v. Roby*, 109 U. S. 440 (3 Sup. Ct. 301, 27 L. Ed. 990); *Erhardt v. Boaro*, 113 U. S. 527 (5 Sup. Ct. 560, 28 L. Ed. 1113); *O'Reilly v. Campbell*, 116 U. S. 418 (6 Sup. Ct. 421, 29 L. Ed. 669).

6. It is very doubtful if either Perelli or Candiani found a vein of mineral bearing rock in place within the Doctor claim prior to posting the respective notices thereon, but the testimony shows that the latter, after February 14, 1900, discovered a lode therein, and if no adverse rights have accrued, the subsequent discovery validates the prior insufficient location: *Zollars & Highland Chief Co. v. Evans*, 4 Mor. Min. Rep. 407; *Patchen v. Keeley*, 19 Nev. 404 (14 Pac. 347). Thus, in *Brewster v. Shoemaker*, 28 Colo. 176 (63 Pac. 309, 53 L. R. A. 793, 89 Am. St. Rep. 188), it was held that when the location of a mining claim was void because no mineral had been found within its boundaries, a subsequent discovery of precious metal therein, made after filing the certificate of location, but before the rights of adverse parties had attached, would sustain the location. In deciding that case, Mr. Chief Justice CAMPBELL, speaking for the court, says: "The order of time in which these several acts are performed is not of the essence of the requirements, and it is immaterial that the discovery was made subsequent to the completion of the acts of location, provided only all the necessary acts are done before intervening rights of third parties accrue. All these other steps having been taken before a valid discovery, and a valid discovery following, it would be a useless and idle ceremony, which the law does not

require, for the locators again to locate their claim and refile their location certificate, or file a new one."

7. The patent plaintiffs secured for that part of the Louise and the Lucky Boy No. 4 mining claims, not a conflict with the Doctor lode, having established the validity of the former claims as hereinbefore stated, no subsequent location could be made thereon unless they abandoned their rights thereto so as to render the premises in dispute a part of the unappropriated public domain. They did not make a location subsequent to defendants', so as to initiate a new right and thus to take advantage of the invalidity of the defective notice, or for any other reason, and hence the only questions to be determined are the alleged abandonment and the identity of the premises embraced therein.

8. It will be remembered that Dyson and Standish, two of the co-tenants, made some markings on the ground to evidence part of the boundaries of the Doctor lode. All the co-tenants, except Moore and Zimmerman, were at the mines and saw Candiani working on the Doctor claim, to which for 18 months they made no objections, but congratulated him on the progress he was making in cutting the tunnel, until he had expended about \$8,000 and discovered valuable ore, when it was ascertained that he was trespassing on their property. The testimony shows that when Candiani first went to the mines Zimmerman informed him of the number of mineral claims plaintiffs possessed and told him about how they were situated with respect to each other. Dyson and Standish were pioneers in the Blue River district, and at the time Candiani first posted a notice on the Doctor lode, they were in possession of the Louise and the Lucky Boy No. 4 mining claims. The latter claims were originally surveyed in 1896, the center line "brushed out" and stakes set at the corners, but the country where these mines are situated is mountainous and the surface covered with dense brush and timber. We think it fairly inferable from the testimony that until June, 1901, when the "Lucky Boy Group" was surveyed for a patent, neither of the respective parties nor their predecessors in interest knew that the Doctor lode conflicted with either of plaintiffs' mining claims. Candiani was a novice in

mining, while Dyson and Standish, and most of the other cotenants claiming the Louise and the Lucky Boy No. 4, were experienced in extracting ores and must have known the method generally adopted of marking on the ground the boundaries of mining claims, of which Candiani was ignorant. The means of information were, therefore, not equal to the respective parties, and this being so, an estoppel may arise to prevent the plaintiffs from asserting their right to the premises in conflict, on the ground of abandonment. Abandonment, it is true, is generally understood to mean the intentional relinquishment of a known right: *Oviatt v. Big Four Min. Co.* 39 Or. 118 (65 Pac. 811).

9. The rights of the plaintiffs and of their predecessors in interest to that part of the Louise and of the Lucky Boy No. 4 mining claims, which is in conflict with the Doctor lode, were inchoate when Candiani first attempted to locate a vein thereon, and hence they were susceptible of abandonment, which is equivalent to a relinquishment to the United States of all interest therein. An abandonment results from a mere exercise of the will.

10. So far as it relates to a vested estate in real property an abandonment is ineffectual to transfer the title: *City of Philadelphia v. Riddle*, 25 Pa. 259.

11. Experience in the mining regions teaches that locations of mineral bearing rock are frequently made on public land for speculative purposes only, and are often considered of little value until paying ore is discovered in the immediate vicinity, when, without any expense to the locators, they may become of immense worth. Such possible fluctuations in value demand a different rule from that which usually governs vested estates in land, and necessitates immediate assertion of inchoate rights in mining claims, when, by the exercise of reasonable diligence, the locators could have discovered that their premises were being invaded. Dyson, Standish, and Frank and Fred Sharkey, who are experienced miners and should have known the location of the boundaries of the Louise and of the Lucky Boy No. 4 mining claims, ought to be estopped to assert that they had any interest therein in conflict with the claim of Candiani as originally

indicated on the ground. To allow them to assert, an adverse claim to that part of the Doctor lode now in controversy, as it should be surveyed, would be violative of every principle of equity and result in rewarding them for encouraging the development of the property.

12. Zimmerman, who owns five twelfths of the Lucky Boy group of mines, resides in Portland, and though he knew Candiani had located a mine in the Blue River district, he was not aware that it conflicted with either claim in which he was interested. Frank C. Sharkey, as superintendent and managing partner, however, represented Zimmerman and also his predecessor in interest, Moore, in supervising the property, and, though such agent could not, ordinarily, without special authority from all the co-tenants, abandon any greater interest than he alone possessed (*Beers v. Sharpe*, 44 Or. 386, 75 Pac. 717; *Conn v. Oberto*, 32 Colo. 313, 76 Pac. 369), the character of his employment and the kind of property in controversy induce the conclusion that he possessed sufficient authority from all the co-tenants to bind them by his negligence in permitting Candiani to take, hold possession of and improve their property for such a length of time.

This brings us to a consideration of the boundaries of the Doctor lode as they should be established. The evidence shows that October 26, 1898, F. C. Sharkey and Geo. A. Dyson located a quartz mining claim, known as the "Gold Dollar," the description of which, as given in the notice, is as follows:

"Commencing at this tunnel and notice and running in a southerly direction towards Main Quartz Creek and situated about 400 feet west of the Lucky Boy ledge, and was formerly known as the Jo. Andrews claim."

Until the plaintiffs secured a survey for a patent, June, 1901, they evidently thought that the Gold Dollar claim was located west of and parallel with the Lucky Boy group, for when Candiani and Perelli first went to the district with a view of securing a claim, they were informed by Dyson that unappropriated mineral land of the United States could be found at the northerly end of the Gold Dollar claim, the corners of which, on that line, were evidenced by stakes which he pointed out to these

visitors. The survey referred to disclosed that the side lines of the Louise and of the Gold Dollar claims extended north 40 deg. 30 min. west, and north 13 deg. 30 min. west respectively, and that the north center end of the latter claim was situated about 480 feet southerly from the northwest corner of the Louise claim and on or near the western boundary thereof. The Lucky Boy No. 4 claim is a northerly extension of the Louise, and the Doctor lode, as surveyed, is a northerly extension of the Gold Dollar claims, the side lines of which are 260 and 683 feet respectively.

Dyson, as plaintiffs' witness, testified that, having been employed by Candiani to mark on the ground the boundaries of the Doctor lode, he placed a center end notice on the stub of a tree a few feet north of the boundary of the Gold Dollar claim; that he put up stakes at the northeast and northwest corners of the latter claim for the southeast and southwest corners, respectively, of the Doctor lode; that, going northerly about 900 feet, he put up another center end notice, and also nailed to a tree another stake on which he wrote, as near as he could remember, "Northwest center end stake of the Doctor mine," and signed the names of Candiani and Perelli as locators; that, having done the writing found on the stake, he was able to read it, saying the word "center" is what he put on it. The stake last referred to was torn down, identified by the witness, offered in evidence, and is sent up for our inspection. There is written on the upper line thereof, with a lead pencil, the following: "N. W.," and a word that is illegible, but appears to begin with the letter "C" and to have the letter "t" therein. The second line is, "of Doctor Mine"; the third, "Perelli"; and the fourth, "Candiani."

A re-examination of the testimony convinces us that when Dyson and Standish originally indicated on the ground the boundaries of the Doctor lode, it was their intention to extend the side lines of the Gold Dollar about 900 feet, so as to include the claim attempted to be located by Candiani and Perelli. Standish appeared as plaintiffs' witness, but he did not attempt to corroborate Dyson's testimony to which reference has been

made. In the absence of such supporting declarations under oath, and from the fact that the Doctor lode was intended and attempted to be located as an extension of the Gold Dollar claim, we think Dyson's testimony should be disregarded, and conclude that the surveyor properly treated the tree having the stake so marked thereon as the northwest corner instead of the northwest center end.

The decree heretofore rendered will be changed to conform with the views now expressed, thereby affirming the decree of the court below; the defendants to recover their costs and disbursements in both courts.

AFFIRMED.

Decided 9 January, 1906.

HIGINBOTHAM v. FROCK.

83 Pac. 536.

VENDOR AND PURCHASER—FORFEITURE OF CONTRACT TO CONVEY—RIGHT TO CANCEL WITHOUT NOTICE.

1. Under a bond for a deed providing that in case of default in any stipulated payment, the vendor may declare the bond void and repossess himself of the premises, the vendor may cancel the contract upon reasonable notice because of the vendee's default, but such a contract is not self executing, and cannot be summarily terminated by the vendor.

VENDOR AND PURCHASER—ABILITY OF VENDOR TO DECLARE FORFEITURE THOUGH HIMSELF UNABLE TO PERFORM.*

2. A vendor in a contract to convey on payment of the purchase price cannot declare a forfeiture for failure of the purchaser to pay so long as he is himself unable to perform by tendering such a title as the contract requires.

FORFEITURE NOT FAVORED IN EQUITY.

3. In a suit to cancel a bond for a deed for the fault of the obligee, equity will not declare a forfeiture.

EFFECT OF BOND FOR DEED—STRICT FORECLOSURE.

4. A bond for a deed confers on the obligee an equitable interest in the property, and a court of equity will seldom grant a strict foreclosure, but will allow a reasonable time for payment.

From Sherman: WILLIAM L. BRADSHAW, Judge.

Suit by Maggie Higinbotham and husband against Henry and Bertha Frock, resulting in a decree for defendants, from which plaintiffs appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Cornelius Jackson Bright*.

*NOTE.—On this point see *Wells v. Page*, 3 L. R. A. (N. S.) 103, with note collecting cases in point.
REPORTER.
(48th Or.—9)

For respondents there was a brief and an oral argument by *Mr. John Bassett Hosford*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to cancel and annul a bond for a deed. On December 20, 1902, the defendant Henry Frock purchased of the plaintiffs 160 acres of land in Sherman County for \$2,500. He paid \$1,200 in cash, giving his three promissory notes for the balance, due the 1st day of October, 1903, 1904 and 1905, respectively. Each note bore interest at 8 per cent, payable annually, and provided that, if the interest was not so paid, the whole sum, both principal and interest, should become immediately due and collectible at the option of the holder of the note. At the same time the plaintiffs executed and delivered to the defendant a bond for a deed, whereby they obligated themselves to convey the land to him in fee simple, by good and sufficient deed, clear of all incumbrances, except certain taxes, which bond contained a stipulation that the defendant should have immediate possession, and this further provision:

"If he shall make default in any of the above deferred payments, or shall violate any of the agreements herein contained, the said obligors [the plaintiffs] may declare this bond void and may forthwith repossess themselves of said premises."

The defendant immediately went into possession. Soon thereafter the plaintiffs assigned and transferred the promissory notes for the deferred payments to Moore Bros. as collateral security. When the first note matured, the defendant offered to pay all the notes upon the delivery to him of a deed to the premises, as stipulated in the bond. Nothing definite was done at that time, however, and in November, he paid \$125 to Moore Bros. on the first note, and again requested a deed, offering at the same time to pay all the notes in full. In January, 1904, the plaintiffs redeemed the notes from Moore Bros., and on the 25th of February notified the defendant that they had elected to terminate the contract and to repossess themselves of the land because of his default in making the payments, at the same time offering to return the unpaid notes. The defendant refused to accept the notes or to relinquish his claim under the

bond. On March 7th he tendered to plaintiffs and offered to pay the entire amount due on the purchase price, and demanded from them a deed as stipulated in the contract. At the time of the attempted rescission by the plaintiffs the property was incumbered by mortgages to the amount of about \$3,600, and they were then in no position to comply with their contract and convey the property to the defendant, free of all liens and incumbrances. Soon thereafter this suit was brought by the plaintiffs. In his answer the defendant pleads the tender made on March 7th, brings the amount thereof into court, and prays for a decree, requiring the plaintiffs to comply with their contract. The defendant had a decree in his favor, and plaintiffs appeal.

1. There are several reasons why the decree of the court below should be affirmed. In the first place, the mere failure of the defendant to make the deferred payments on the purchase price of the land did not, *ipso facto*, entail a forfeiture of his rights under the contract. The stipulation in the bond is that, if default is made in any of the deferred payments, the obligors (the plaintiffs) may declare the bond void and repossess themselves of the premises. This provision gave the plaintiffs power to put an end to the agreement if they elected to do so, but the mere default of the defendant did not terminate the contract or work a forfeiture of his rights, unless the plaintiffs should elect to insist upon a strict performance according to its terms, in which case they were required to give him timely and reasonable notice of their intention to cancel the contract, so he might have an opportunity to comply with its terms and make the payments: *Pomeroy, Contracts* (2 ed.), § 393; *O'Connor v. Hughes*, 35 Minn. 446 (29 N. W. 152). "Such notice," says *DICKINSON, J.*, in *O'Connor v. Hughes*, a case similar to the one at bar, "might have been given before the time named for payment, or, if not so made, notice might have been given after default, fixing a reasonable time within which payment would be required; but the rights of the purchaser under a contract not absolutely terminated cannot be extinguished by a summary declaration of forfeiture."

2. Again, the plaintiffs could not declare a forfeiture at the time they attempted to do so, because they were not then in a position to comply with the contract on their part. The property was subject to mortgages for about \$3,600, and they could not convey it to the defendant in fee simple, free from all liens and incumbrances, as they had agreed to do. The rights of a vendee under a contract like the one under consideration cannot be forfeited by the vendor, although default has been made in the payments, unless he is in a position to perform his part of the agreement: 29 Am. & Eng. Enc. Law (2 ed.), 693; 2 Warvelle, Vendors (2 ed.), § 822; *Wells v. Page*, 48 Or. 74 (82 Pac. 856, 3 L. R. A., N. S. 103); *Baker v. Bishop Hill Colony*, 45 Ill. 264.

3. And, finally, this is a suit in equity, either to declare a forfeiture or to foreclose the defendant's equitable rights in the property. It is a familiar doctrine that a court of equity will not declare a forfeiture, but will leave a party entitled thereto to his legal remedy if any: 1 Pomeroy, Equity (3 ed.), § 459. So that plaintiffs are not entitled to relief on that ground.

4. If, on the other hand, the suit is to be treated as one for the foreclosure of defendant's interest in the property, the plaintiffs are not entitled to the relief demanded; for, having invoked the aid of a court of equity, they are bound themselves to do equity. The bond for a deed transferred to the purchaser an equitable title: *Burkhart v. Howard*, 14 Or. 39 (12 Pac. 79); *Sayre v. Mohnney*, 30 Or. 238 (47 Pac. 197); *Security Sav. Co. v. Mackenzie*, 33 Or. 209 (52 Pac. 1046); *Sievers v. Brown*, 34 Or. 454 (56 Pac. 171, 45 L. R. A. 642). By instituting this suit the plaintiffs recognized that defendant has some interest in the property which they desire to have forever barred and foreclosed. An application for a strict foreclosure is always addressed to the sound discretion of the court, and when enforced at all will not be done without giving the defendant a reasonable time to comply with his contract: *Security Sav. Co. v. Mackenzie*, 33 Or. 209 (52 Pac. 1046); *Flanagan Estate v. Great Cent. Land Co.* 45 Or. 335 (77 Pac. 485).

The decree of the court below is affirmed.

AFFIRMED.

Decided 22 May, 1906.

STATE ex rel. v. RHODES.

85 Pac. 332.

ORGANIZATION OF COUNTY COURTS—TERMS—VOID ORDERS CALLING LOCAL OPTION ELECTION.

The persons designated by statute to compose a county court do not constitute such court for the transaction of county business except when they are in session at a time and place properly and legally determined, and only such orders as are then made are valid.

For example: Where a county judge and a commissioner met at a time not fixed by statute or any order of court, a writing then signed by them purporting to call an election under the local option law is not an order of court and is void, as those persons did not then compose the county court.

From Yamhill: WILLIAM GALLOWAY, Judge.

Mandamus by the State, *ex rel.*, against B. F. Rhodes, county judge, and others. From an order dismissing the writ the relators appeal. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 600.

AFFIRMED.

For appellants there was a brief over the name of *Frank B. Rutherford*.

For respondents there was a brief over the names of *McCain & Vinton* and *Martin L. Pipes*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a special proceeding, instituted by the State of Oregon, on the relation of F. B. Rutherford and others, against B. F. Rhodes, as county judge of Yamhill County, and A. M. Waddell and R. L. Booth, as county commissioners thereof, to compel them, as the county court of that county, to make an order declaring the result of an election held therein, November 8, 1904, to determine whether or not the sale of intoxicating liquors as a beverage should be prohibited, and absolutely to forbid such sales. An alternative writ of mandamus, showing the relators' *prima facie* right, under the provisions of the local option liquor law, to a performance of the ministerial duty sought to be enforced, was issued, whereupon the defendants, answering, denied the material allegations thereof and averred, *inter alia*, that when the petition for an election for the purpose specified was filed, the county judge and one county commissioner, in vacation; after an adjournment of a regular term of the county

court, and without a special term thereof having been called, attempted to make an order authorizing an election to be held to determine the proposed question, but that such order was void, in consequence of which the election was illegal, whereby the performance of the acts sought to be enforced did not devolve upon the defendants as a duty resulting from their respective offices. A demurrer to the averments of new matter in the answer, on the ground that the facts thus stated did not constitute a defense to the alternative writ, having been overruled, the proceedings were dismissed, and the relators appeal.

Our statute prescribing the terms of county courts contains the following provision:

"The county court is held at such times as may be appointed by law, and at such other as the court in term, or the county judge in vacation, may appoint, in like manner and with like effect as the circuit court or judge thereof is authorized by Section 901." B. & C. Comp. § 915.

The county judge and county commissioners of any county in this state do not constitute the county court thereof for the transaction of county business unless they assemble at the time prescribed by law, or at a time designated by a general order of such court to that effect made and entered in the journal during the term time, or by a special order made and filed by the county judge in vacation, authorizing the transaction of certain business therein specified. The county judge of Yamhill County and a county commissioner thereof not having assembled at a time thus prescribed, they did not compose the county court of that county for the transaction of county business, and could not make a valid order authorizing the calling of an election to determine whether or not the sale of intoxicating liquors as a beverage should be prohibited therein, and their attempt to make a regulation to that effect was void: *Marsden v. Harlocker*, 48 Or. 90 (85 Pac. 328).

It follows from these considerations that the judgment should be affirmed; and it is so ordered.

AFFIRMED.

Decided 22 May, rehearing denied 17 July, 1906.

PAXTON v. LIVELY.

85 Pac. 501.

SURETY ON APPEAL—OFFICER OF COURT—UNITED STATES COMMISSIONER.

A United States commissioner is an officer of a court, under the laws of the United States, and therefore disqualified to become a surety on an appeal bond, under B. & C. Comp. §§ 1507 and 549, subd. 3.

Appeal from Wallowa County.

Statement by MR. JUSTICE HAILEY.

O. F. Paxton recovered judgment against L. D. Lively, who appealed to this court and filed his transcript on appeal herein, whereupon plaintiff filed a motion to dismiss the appeal for the reason that the defendant had failed to file a proper undertaking on appeal, in that the surety thereon was not qualified as by law required. The record discloses that the plaintiff excepted in the lower court to the sufficiency of the surety on the undertaking and required him to justify before the county clerk, where he testified that he then was, and for several months had been, a United States commissioner appointed by the United States District Court for the District of Oregon, and made no other showings as to his qualifications as surety. **DISMISSED.**

Mr. D. W. Bailey and Mr. D. W. Sheahan for the motion.

Mr. J. A. Burleigh, contra.

MR. JUSTICE HAILEY delivered the opinion of the court.

The sole question raised by this motion is whether or not a United States commissioner is qualified to act as surety on an undertaking on appeal under our law. Subdivision 3 of 549, B. & C. Comp., provides:

"The qualifications of sureties in the undertaking on appeal shall be the same as in bail on arrest, and, if excepted to, they shall justify in like manner."

Section 1507, B. & C. Comp., defining the qualifications of bail on arrest, provides:

"No counselor or attorney, sheriff, clerk of any court, or other officer of any court, is qualified to be bail."

In *Todd v. United States*, 158 U. S. 278-282 (15 Sup. Ct. 889, 39 L. Ed. 982), Mr. Justice BREWER, in speaking of a commissioner of the United States Circuit Court, said: "He is

simply an officer of the circuit court, appointed and removable by that court." Congress in 1896 abolished all commissioners of circuit courts and provided that the United States District Courts for each judicial district should appoint United States commissioners, who "shall have the same powers and perform the same duties as are now imposed upon commissioners of the circuit courts": Act May 28, 1896, c. 252, § 19, 99 Stat. U. S. 184 (U. S. Comp. Stat. 1901, p. 499, 4 Fed. Stat. Ann. 61, 79). The surety in the undertaking on appeal herein, being a United States commissioner, was an officer of a court, and therefore not qualified as surety.

The motion will be allowed, and the appeal dismissed.

DISMISSED.

Argued 20 March, decided 22 May, 1906.

MILLER v. BEAVER HILL COAL CO.

85 Pac. 502.

MASTER AND SERVANT—LIABILITY FOR MEDICAL ATTENDANCE—EFFECT OF PAYING HOSPITAL DUES—CHARITIES.*

*NOTE.—The following cases, having appended either notes or the briefs of counsel, may be consulted with reference to the question here considered: *Williamson v. Louisville Industrial School*, 23 L. R. A. 20; *Union Pac. R. Co. v. Artist*, 23 L. R. A. 581; *Eightmy v. Union Pac. R. Co.* 27 L. R. A. 840; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan*, 50 Am. St. Rep. 313, 27 L. R. A. 840; *Hearns v. Waterbury Hospital*, 31 L. R. A. 224; *Bedford Belt Ry. Co. v. McDonald*, 60 Am. St. Rep. 172; *Sawdey v. Spokane Falls & N. Ry. Co.* 94 Am. St. Rep. 880.

REPORTER.

The collection by a master from his servants of a stated amount each month for maintaining a hospital for his employees, in the absence of a contract with such servants to furnish them attendance at the hospital, amounts to only a subscription by the employees for the support of a place where they can obtain such attendance as the amount subscribed will provide, and the master is not bound to supply all the medical or surgical services that may be needed by injured contributors, though he is bound to spend the subscription for the purpose indicated and to use ordinary care in selecting the persons to have charge of the hospital.

From Coos: LAWRENCE T. HARRIS, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by Victor Miller against the Beaver Hill Coal Co. to recover damages for the breach of an alleged contract by which the defendant agreed to provide the plaintiff with necessary medical and surgical attention, at a hospital

maintained by it, in case of his injury while in its employ. The facts, as disclosed by the testimony, are these: The defendant company is engaged in coal mining at Beaver Hill, in Coos County. It has a hospital at its mine in charge of a physician at which its employees, and those of subcontractors paid through its office, are entitled to be cared for free in case of sickness or injury while in its service. For the support and maintenance of the hospital \$1.50 a month is deducted from the wages of each employee by their consent, or at least without objection from them. In August, 1904, the plaintiff, while at work for a subcontractor, was seriously injured by an iron splinter penetrating the abdominal wall. He was taken to the company's hospital and the wound examined by Dr. Chambers, who was temporarily in charge during the absence of the regular physician. The doctor found the wound to be of such a character as to require a surgical operation which could not be performed by him alone or with the facilities at his command. He telephoned to Coquille, the nearest town, for assistance, but was unable to obtain a surgeon from that place and thereupon at plaintiff's request telephoned to Marshfield to Dr. Mingus, who came out to the mine and performed the necessary operation. Mingus charged the plaintiff \$250 for his services, and, defendant refusing to reimburse him therefor, he brought this action to recover the amount. At the close of plaintiff's testimony the defendant moved for a nonsuit, which motion was overruled and a verdict rendered in favor of plaintiff. From the judgment entered on the verdict, the defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Coke & Seabrook* and *A. J. Sherwood*, with an oral argument by *Mr. J. L. Coke*.

For respondent there was a brief over the names of *E. L. C. Farrin* and *J. M. Upton*, with an oral argument by *Mr. Upton*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This action is founded on contract, and before the plaintiff can recover he must show that defendant agreed to furnish him with necessary medical and surgical attendance in case of in-

jury, and that it neglected to comply with its contract.. The only evidence on this question was the testimony of the plaintiff and the witnesses Bjorquist, Anderson and Carlson. The plaintiff testified that for some time prior to his injury he had been assisting in getting out mine timbers for the defendant and that it retained \$1.50 each month from his wages "for the hospital." Bjorquist said the defendant had a hospital at the mine where sick and injured employees were cared for free, and that \$1.50 a month was regularly deducted from the wages of each employee by the company for its support, but that he did not know who employed the physician in charge. Anderson and Carlson testified to substantially the same state of facts. Dr. Swennson, an admittedly competent physician and surgeon, was in charge of the hospital, and testified that he was employed by the defendant, that he was in Portland at the time of the accident to the plaintiff and left the hospital in charge of Dr. Chambers, who was a proper person for that purpose.

This is all the testimony that was given on the trial on the question now under consideration, and we are of the opinion it falls short of proving a contract by the defendant to provide the plaintiff with necessary medical and surgical attendance in case of injury. It merely shows that a certain sum each month was contributed by the plaintiff and his fellow employees, or exacted by the company, for the support and maintenance of a hospital for the use of the employees. There is no evidence that any statement or promise was made by the defendant to the plaintiff, or any of its employees, as to the object and purpose of the contribution or the benefit they would receive therefrom, other than it was for hospital purposes. The transaction, therefore, under the testimony, constituted in law nothing more than a subscription by the plaintiff and the other employees for the charitable purpose of maintaining a hospital, where they could obtain such medical attendance and hospital accommodations as the fund thus subscribed would afford. And the only liability assumed by the defendant in collecting the fund was to expend it for the purpose for which it was subscribed, and no other. The mere fact that it received or exacted the contribu-

tion did not impose upon it the absolute duty to furnish each contributor all the medical or surgical attendance he might need or require, whether the fund provided was sufficient or not. A sick or injured employee was entitled to the use and benefit of the hospital and the medical services there provided, to the extent of the money contributed for that purpose, but he was not obliged to go to the hospital or to accept the accommodations. He could, if he chose, go elsewhere and employ physicians and attendants other than those provided by the company, and, if he did so, the company would not be liable to reimburse him therefor. The only duty of the company was to use ordinary care in the expenditure of the money and in the employment of physicians and surgeons in charge of the hospital, and it is not responsible for the negligence of the surgeon so employed in going away and leaving the hospital in charge of another: *Union Pacific Ry. Co. v. Artist*, 60 Fed. 365 (9 C. C. A. 14, 23 L. R. A. 581); *South Florida Ry. Co. v. Price*, 32 Fla. 46 (13 South. 638); *Eighmy v. Union Pacific Ry. Co.* 93 Iowa, 538 (61 N. W. 1056, 27 L. R. A. 296); *Atchison, Topeka & S. F. R. Co. v. Zeiler*, 54 Kan. 340 (38 Pac. 282); *Richardson v. Carbon Hill Coal Co.* 10 Wash. 648 (39 Pac. 95).

This action is not based upon a misapplication or misappropriation of the hospital fund by the defendant, or the employment of an unskillful surgeon by it, but upon an alleged contract to furnish plaintiff with necessary medical and surgical attendance—an averment entirely unsupported by the testimony.

The judgment is therefore reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Argued 20 March, decided 22 May, 1906.

MACRAE v. SMALL.

85 Pac. 503.

WATERS—POINT OF APPROPRIATION IN A DITCH.

1. A valid appropriation of water may be made by diverting it from an artificial waterway if the owner thereof consents; but a seizure of water from another's ditch cannot be the foundation of an appropriation.

EVIDENCE OF RELINQUISHMENT OF WATER RIGHT.

2. The evidence shows that the defendant did not intend to relinquish an appropriation made by his predecessor in interest.

EVIDENCE OF ADVERSE USE OF WATER.

3. The evidence does not show that the defendant's water rights were lost by adverse use by another, as such use was not exclusive of plaintiff's use.

ADVERSE USE—KIND OF EVIDENCE REQUIRED.

4. The evidence of adverse use required to deprive an appropriator of his vested right to the use of water must be clear and convincing.

From Grant: MORTON D. CLIFFORD, Judge.

Suit for an injunction, resulting in a decree for defendant, from which this appeal is taken. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. Errett Hicks*.

For respondent there was a brief with oral arguments by *Mr. John Langdon Rand* and *Mr. Morton D. Clifford*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit by Kenneth F. MacRae against James Small to enjoin interference with the flow of water in a ditch to plaintiff's premises, and to recover damages for intermeddling therewith, his right being based on an alleged appropriation, and also on a prescriptive use. The answer denies the material allegations of the complaint, and avers that the defendant's predecessor in interest made a prior appropriation of all the water in question in 1870, which quantity had ever since been used in irrigating the lands now owned by the defendant. The reply admits that defendant's predecessor constructed a small ditch from a stream to his premises, appropriating about six inches of water and, on December 10, 1881, conveyed the lands to defendant's grantor, who immediately abandoned such use, and alleges that no right to the water was thereafter asserted until June 1, 1902. The cause was tried, resulting in a decree for the defendant; awarding him the use of all the water in controversy, and plaintiff appeals.

The transcript shows that about 1870, one Marcus D. Reeves settled on unsurveyed public land through which a perennial stream flows that was subsequently called Reeves' Creek. This brook rises in a spur of the Blue Mountains in Grant County,

flows southerly and empties into the John Day River, affording in the dry season about 20 inches of water, miners' measurement. Reeves in 1872 constructed a flume from the creek with which he connected a ditch, whereby water was diverted and used to irrigate crops grown on the arid land on which he had settled. The township in which such land is situated was surveyed in 1873, by authority of the general government, whereupon Reeves filed a homestead claim on the premises containing his improvements, described as follows: The S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 12, in township 13 S., of range 27 E., of the Willamette Meridian, and April 20, 1882, a patent from the United States was issued to him therefor. Reeves built a good house on this land, fenced most of it, cultivated several acres thereof, and raised good crops thereon by use of the water which he had diverted. He also irrigated with water from his ditch a meadow of about 10 acres on land subsequently patented to Louisa Aldrich, which is described as follows: The S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, the W. $\frac{1}{2}$, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of that section.

Reeves and his wife had some difficulty in consequence of which he left her, after making final proof in support of his entry, and made his home with one Robert B. Hay, to whom, on December 10, 1881, he executed a deed of his land, but she did not join in the conveyance. Hay also obtained a deed of the Aldrich land, and on October 4, 1889, conveyed it and the Reeves tract to the defendant. Reeves left Grant County soon after executing his deed, and having never since been heard from, it is generally believed that he is dead. Mrs. Reeves subsequently married M. E. Gage who in 1884, settled on the N. one half of the N. one half of section 11 in that township and range, which land was then owned by the Eastern Oregon Land Co., a corporation, the title thereto having been secured, with other lands, by mesne conveyances from the United States, pursuant to an act of Congress of February 25, 1867 (14 Stat. U. S. 409, c. 77), granting lands to the State of Oregon to aid in the construction of a military wagon road, and also conformable to an

act of the legislative assembly of this state (Laws 1868, p. 3), designating the Dalles Military Road Co. as the artificial being entitled to the benefits of such grant. Gage, in the spring of 1886, took possession of Reeves' flume, which he repaired, and of his ditch, which he cleaned out from its head to a point near the termination thereof, from which he constructed a ditch to land on which he had settled, and used the water of Reeves' Creek to irrigate crops. He executed a quitclaim deed, December 31, 1888, to plaintiff of all his interest in such land, but no mention was made therein of any ditch or water right. The Eastern Oregon Land Co., on November 1, 1890, gave a deed of such land to the plaintiff, who, ever since securing possession of the premises from Gage, has caused water so diverted to be used in irrigating crops grown thereon until June 1, 1902, when his ditch was cut by defendant's tenant, thereby causing an embroilment which resulted in this suit.

The first question to be considered is whether the testimony shows that the use of water from Reeves' Creek was abandoned by Hay, and not thereafter resumed by the defendant until the ditch referred to was cut, and whether MacRae and his predecessor in interest for more than 10 years prior to bringing this suit have, under a claim of right, openly, notoriously, and continuously, applied such water, each season, to the irrigation of crops grown on his land, thus securing by prescription a preferred right thereto? Neither Hay nor the defendant ever lived on the land now owned by the latter, but as they were severally engaged in raising sheep, their flocks were occasionally kept thereon during winters, and in the summers they were driven to and herded on distant ranges. After Reeves conveyed his homestead, the fences which he had built were allowed to decay and sage brush was permitted again to grow on all the land that he had cultivated, except about an acre thereof on which, by the use of water from the ditch, garden vegetables were occasionally raised by persons who temporarily occupied the house on the premises. Some placer mining was attempted on the Aldrich place by using water from the ditch, but as this work was not done in the irrigating season the extent of such

use is not deemed material. In the 10 years from the spring of 1886, when Gage first applied the water to the irrigation of crops grown on the land now owned by plaintiff, gardens were cultivated and vegetables raised on the Reeves' homestead by persons and in area as follows: H. Munjar, Jr., in 1893, not an acre, and J. E. Noble in 1894 and the following year about an acre. This is the extent of the use of such water for irrigating the defendant's tillable land during the entire period of the statute of limitation. J. Helmadore, as defendant's witness, testified that in October, 1899, he took a band of sheep to the Reeves land and kept them there for Small until the following spring, and that while on the place he put some rocks in the head of the ditch and turned water on defendant's land to irrigate grass growing on a meadow. The defendant, as a witness in his own behalf, testified that when he purchased the Reeves and the Aldrich lands the fences once standing thereon were nearly all destroyed, and that cattle and horses could come and go at will over the entire premises, but that by the use of water from the Reeves ditch, grass could be kept alive without inclosing the meadow on which it grew; that every year after securing the deed to these lands he had sent men thereto from his home ranch, about four miles distant, to irrigate the premises, frequently going there himself for that purpose, always using the water when necessary and sometimes taking the entire flow of the ditch, thereby keeping the timothy growing on a meadow and also irrigating a lower bench of cultivated land, containing in all about 10 or 12 acres which were partly covered with sage brush; and that he never gave Gage or McRae any authority to use the water, though as a neighborly act he had permitted the surplus after supplying his needs to flow in the ditch to plaintiff's land, until he learned that a right thereto by adverse user was claimed.

The plaintiff's witnesses, who lived in the vicinity of the Reeves' land severally testified that they never saw the defendant or his employees using water from the ditch. It further appears that plaintiff's occupation is raising sheep, which business Gage was formerly conducting, and as the latter was

grazing more land than the parties hereto thought he was entitled to occupy, the plaintiff, at the defendant's suggestion, purchased Gage's interest in the lands on which he had settled, and MacRae, referring thereto, testified that defendant then made no claim to the use of the water thereon from Reeves' creek. When Gage's deed was executed an agreement was consummated whereby plaintiff was to keep his sheep west of Reeves' creek, and the defendant would pasture his flocks east of that stream, the terms of which contract the parties have ever since observed. The defendant further testified that he advised plaintiff to purchase Gage's interest in the lands on which he had settled, but he did not then know that any water from Reeves' creek had been used on the premises. The plaintiff does not live on the Gage place, but his tenants have cultivated about 35 acres thereof which, without the use of water from Reeves' creek, must become nearly valueless. Gage testified that when he applied the water of such creek to the irrigation of crops grown on the land now owned by plaintiff he knew that the premises were within the limits of the grant to the State of Oregon, but that he thought, because a part of the section had been settled upon prior to the act of Congress, that the land which he selected would not pass under the terms of the grant, and that he could procure a title thereto directly from the United States, but that having applied therefor at the local land office he was unable to make an entry thereon. The foregoing is the substance of the testimony given at the trial from a consideration of which the plaintiff's right to use the water of Reeves' creek, if it exist, must be determined.

1. Gage was evidently a trespasser on the land on which he settled, but as the use of water thereon was undoubtedly a benefit to the Eastern Oregon Land Co., the owner of the premises, and as such advantage regularly passed to the plaintiff, it will be assumed, without deciding the question, that Gage was authorized to make a valid appropriation of water, and to apply the same to such land. Such appropriation could legally have been made by taking water from the Reeves ditch, if the consent of the owner thereof had been secured: *Water Supply &*

Storage Co. v. Larimer & W. Irrig. Co. 24 Colo. 322 (51 Pac. 496, 46 L. R. A. 322); *North Point Consol. Irrig. Co. v. Utah & Salt Lake Canal Co.* 16 Utah, 246 (52 Pac. 168, 40 L. R. A. 551, 67 Am. St. Rep. 607). In *McPhail v. Forney*, 4 Wyo. 556 (35 Pac. 773), Mr. Justice CONAWAY, speaking for the court in discussing this question, says: "Plaintiff in error also forgets that it is just as necessary to the creation and preservation of a water right; to provide means for the continual diversion of the water from its natural channel and for conducting it to the place where it is applied to some beneficial purpose, as it is to apply it to the beneficial purpose. And he cannot arbitrarily seize and use another's ditch, or interest in a ditch, for that purpose." No consent to divert the water from the ditch was ever secured, but Gage arbitrarily seized and used the conduit constructed across patented land, and hence plaintiff, as his successor in interest, never acquired any right by appropriation to the use of water from Reeves' Creek.

2. A careful examination of the testimony convinces us that neither Hay nor Small intended voluntarily to relinquish the valuable right of appropriation which was initiated by Reeves, and conveyed by express stipulation contained in his deed.

3. It is contended by plaintiff's counsel, however, that from the spring of 1886 to the corresponding season of 1896, the 10 years prescribed by the statute of limitation, during which Gage and the plaintiff used the water in question, no part of the lands so owned by the defendant was irrigated, except a small garden, requiring not to exceed an inch of water, which is the greatest measure of his right, and that the plaintiff and his predecessor in interest, in the interim acquired by prescription a right to the remainder of the water flowing in Reeves' Creek, all of which is necessary to his use in the irrigating season. If the testimony of the defendant is to be believed, that each year after securing Hay's deeds of the premises he used such quantities of water as he needed to irrigate his meadow and other land, sometimes taking the entire flow of the stream, there was therefore such an interference with plaintiff's alleged continuous user as to defeat his prescriptive right.

It is argued by plaintiff's counsel that as the defendant's testimony in relation to the very existence of the alleged meadow is uncorroborated, except possibly by that of Helmadore, and denied by all other witnesses, the improbability of such declaration under oath is self-evident when it is considered that an unfenced meadow would be entirely destroyed by cattle, horses and sheep grazing thereon. If the grass was utterly uprooted as intimated, its complete destruction in the manner suggested would not necessarily disprove the defendant's statement that the water was applied to his meadow and cultivated land, for, the right to the entire use of the stream being primarily vested in him, as Reeves' successor in interest, he might have wasted the entire volume of water on the land which had once produced grass and crops and thereby interrupted plaintiff's adverse user. That no person living in the vicinity of the Reeves or Aldrich lands saw the defendant or his employees using water on his meadows does not disprove his testimony, for it does not appear from the transcript that a view of the meadow could, at all times, have been obtained by plaintiff's witnesses. That the defendant did not call any of his employees, except Helmadore, to corroborate his statement, to the effect that he frequently sent them to these lands to irrigate grass growing thereon, or offer any proof of their death, absence or inability to attend the trial, is a circumstance tending to discredit him. So, too, the plaintiff's testimony that if the defendant ever interfered with the ditch he was never aware of any diminution of the water which continuously flowed therein to his premises, where it was used for irrigation, directly controverts the defendant's statement under oath.

4. It is impossible to say with certainty that the defendant's testimony, in the particular mentioned, is true, but as he is entitled to the prior right of appropriation of all the water of the creek, and could only be deprived thereof by an adverse user, the evidence of such prescriptive right ought always to be clear and conclusive, in order to defeat a vested estate in or an appurtenant to land: 1 Am. & Eng. Enc. Law (2 ed.), 887; 1 Cyc. 1151. The agreement entered into whereby the flocks of sheep

of the defendant and of the plaintiff were respectively kept on separate sides of Reeves' Creek, tends to show the friendly relation formerly existing between the parties to this suit and probably accounts for the flow of the surplus water in the ditch to plaintiff's premises. The testimony, in our opinion, fails to show that plaintiff has made out a case with that degree of proof which the rules of law require in such cases, but rather that the weight of evidence discloses that defendant's irrigation of his meadow and other land, by means of the flume and ditch from Reeves' Creek broke the continuity of plaintiff's enjoyment of the water, thereby depriving him of a prescriptive right thereto.

These conclusions necessitate an affirmance of the decree, which is ordered.

AFFIRMED.

LIVESLEY v. HEISE.

Argued 29 March, decided 29 May, 1906.

85 Pac. 509.

FRAUDULENT CONVEYANCES—PARTICIPATION OF GRANTEE.

1. In suits to prevent the consummation of a fraud on plaintiff by transferring property in which he is interested, it must appear that the grantee participated in the fraudulent intent.

FRAUDULENT CONVEYANCES—RELATIVES—BURDEN OF PROOF.

2. Where conveyances are made to near relatives, the effect of which is to prevent creditors from satisfying their claims, the burden of proving good faith is on the grantees.

EVIDENCE CONSIDERED.

3. The evidence shows that the grantees in the present case were not parties to any fraudulent intent that the grantor may have had.

PARENT AND CHILD—EMANCIPATION—RIGHT TO EARNINGS.

4. The earnings of a minor child who has been allowed by his parents to act in business matters independent of their control are not liable to the claims of creditors of the parents.

LEASE—SUFFICIENCY OF CONSIDERATION.

5. A promise not to claim further rent under the terms of a lease is a sufficient consideration for a release of all rights under it, and a promise to pay rent is an adequate consideration for the execution of a lease.

BREACH OF CONTRACT—MEASURE OF DAMAGES.

6. The measure of damages for the breach of a contract to sell is the difference between the purchase price and the market price on the date of delivery.

COSTS ON APPEAL IN EQUITY CASES.

7. Costs and disbursements on appeal in equity cases are assessed as the discretion of the appellate court may suggest.

From Polk: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by T. A. Livesley and John J. Roberts, partners as T. A. Livesley & Co., against A. Heise, Rachel E. Heise, his wife, and W. C. Heise, their son, originally to enjoin the disposal of certain hops grown in 1903, and to compel the specific performance of a contract to sell and deliver the crop to plaintiffs. The complaint sets out the facts constituting their right to the hops, and alleges a conspiracy on the part of the defendants to defraud plaintiffs. A demurrer to the complaint was sustained, the temporary injunction was dissolved, the suit dismissed, and plaintiffs took an appeal, on the trial of which the decree was reversed, the demurrer overruled, and the cause remanded for further proceedings: *Livesley v. Heise*, 45 Or. 148 (76 Pac. 952). While that appeal was pending the hops were sold and shipped out of the State. When the mandate was sent down plaintiffs filed a supplemental complaint, stating the changed condition of the hops and praying a recovery against the defendants of the value of the crop as damages for the breach of contract. The defendant Heise separately, and his wife and son jointly, answered, denying the material allegations of the original and the supplemental complaints, and averring that in 1901 and the year following, Heise cultivated hop-yards leased to him, and delivered the crops grown thereon to plaintiffs, but that in consequence of his financial embarrassment he was compelled to relinquish his rights under the leases and to surrender the possession of the demised premises to the owners thereof, and that Mrs. Heise and her son leased the same yards and raised hops thereon in 1903, in which Heise had no interest. The allegations of new matter in the answers having been denied in the replies, a trial was had, and plaintiffs were awarded a recovery against Heise in the sum of \$2,764.80, as the damages sustained by reason of his failure to perform the terms of his contract, but Mrs. Heise and her son were decreed to be the owners of the hops in question and entitled to their costs and disbursements, and the plaintiffs again appeal. MODIFIED.

For appellants there was a brief over the names of W. M.

Kaiser, W. T. Slater and Teal & Minor, with oral arguments by *Mr. Woodson Taylor Slater* and *Mr. Wirt Minor*.

For respondents there was a brief with oral arguments by *Mr. George Greenwood Bingham* and *Mr. Peter H. D'Arcy*.

MR. JUSTICE MOORE delivered the opinion of the court.

The transcript shows that about January 26, 1900, the defendant A. Heise leased two hop-yards in Polk County, containing 25 and 20 acres, from his mother-in-law, Mrs. N. W. Harris, and brother-in-law, E. L. Harris, respectively, for the term of five years, the consideration being one fifth of the hops to be raised annually thereon. About the same time he entered into an agreement with plaintiffs to cultivate, sell and deliver to them 30,000 pounds of merchantable hops on or before the 15th of October of each year during the term of his leases, at 10 cents a pound, the plaintiffs to make certain advances to enable him to cultivate the yards and to harvest the hops. Heise complied with his contract during the first two years, except that in 1902 he attempted secretly to dispose of about 35 bales of hops, but was prevented from doing so by plaintiffs. When he settled with plaintiffs for the year 1902, he had received such advances on account of his crop that there remained only \$288.50 due him for the season's work. The plaintiffs charged him \$69.49 for examining his hops, and also assessed to him premiums for insurance on his crop taken out in their names in pursuance of the terms of the contract but the policies for which they refused to exhibit to him. The controversy arising in relation to these matters culminated in a notice given by Heise to plaintiffs that he would not longer be bound by the terms of his contract, and that he should surrender his interest in the leases to the owners of the demised premises. The plaintiffs thereupon offered to operate the yards in fulfillment of the terms of the contract, but Heise refused to assign to them any part of his term. Of the sum of money so received he paid his brother-in-law \$180, and being still in debt, an action was instituted against him in a justice's court, so that at that time he owed several hundred dollars and had no money or property with which to make payment.

After the crops of 1902 were harvested, Mrs. Heise, leaving her husband in Polk County, came to Salem, where she sent her two sons and two daughters to school, paying their tuition in advance with money she had earned by picking hops and selling turkeys she had raised. Needing more money to support herself and family, she reluctantly conveyed to her brother, E. L. Harris, on December 3, 1902, an undivided interest in certain real property that she inherited from her father, receiving therefor \$665. On the same day Heise executed to the owners of the hopyards releases of all his interests therein for the remainder of the terms, which relinquishments were accepted. E. L. Harris, December 4, 1902, and his mother, February 2, 1903, severally leased to the defendants Mrs. Heise and W. C. Heise, the hopyards so surrendered, for terms to expire October 1, 1905, in consideration of the lessees' agreement to give one fifth of the hops annually to be grown on the premises. About February 1, 1903, Mrs. Heise removed to Polk County, and with the money remaining from the sale of her patrimony supported her family and raised hops that year in the yards so leased to her and her son, her husband and children aiding her in the enterprise. The plaintiffs, April 4, 1903, mailed to Heise their check for \$150, inclosed in a letter which stated that the money evidenced thereby was an advance on his hop contract with them, but he refused to accept it and returned the draft, writing them that he had no use for it. Mrs. Heise's mother and brother, during the season of 1903, furnished her and her son sustenance for their teams, supplied them tools and farming implements to enable them to cultivate the yards, and also loaned them the sum of \$2,500, to pay the expenses of harvesting, taking as security therefor a chattel mortgage on the crop, pursuant to the terms of which they took immediate possession of the hops as soon as they were baled, and, after the injunction was dissolved, sold the same, retaining the sums due them and paying the remainder to Mrs. Heise and her son.

Though Heise assisted in cultivating and harvesting the hops, for which service it does not appear that he received any com-

pensation, his wife and eldest son, who was then a minor, employed, discharged and paid the persons who labored in the yards and about the dry houses. E. Seiwert, who was employed in the hopyard in 1903 by W. C. Heise and paid for his services by a check drawn on the bank by the latter, as defendants' witness, testified on cross-examination as follows:

"Q. Are you acquainted with A. Heise?

A. Yes, sir.

Q. Did you see him at that time?

A. Yes, sir.

Q. What was he doing?

A. Nothing; just joshing the boys; having a good deal of fun once in a while.

Q. Did you see him there all the time?

A. No, sir."

E. L. Harris, as defendants' witness, testified that in October, 1902, Heise told him he did not have sufficient money with which to operate the hopyards, and for that reason he was not going to rent them any longer; that the witness did not then begin to look for another tenant or think much about the matter until he obtained releases of the demised premises; that he negotiated with Mrs. Heise about two days before he secured her deed of the real property which she inherited from her father; and that after securing such releases and deed, he then advised his sister and her son to rent the hopyards, which proposal having been accepted, leases thereof were executed to them. Mrs. Heise, as a witness for herself, testified that, knowing her husband did not intend to raise hops in 1903, she sold her interest in the real property to obtain money with which to educate her children; that from the sum so received she paid an old grocery bill of about \$100, which her husband was unable to liquidate; that after he had executed releases of all his interests in the demised premises and subsequent to the making of her deed, her brother told her that as she then had the necessary means, it would be advisable for her and her son to rent the hopyards, and that at his suggestion she consented to the proposal in pursuance of which the leases were made out to them.

1. From the foregoing testimony, plaintiffs' counsel insist that, as the contract which their clients consummated with Heise related to real property then leased to him and to the crops annually to be raised thereon, when the possession of such premises voluntarily passed to his wife and son, with knowledge thereof, they took the leases subject to the conditions imposed, and, though equity might not compel them to perform the labor necessary to produce a crop, when they did so, and the hops came into existence, plaintiffs were entitled thereto, but the crop having been sold by them, they are liable to plaintiffs for the value thereof, which is the measure of the damages sustained, in refusing to give which an error was committed. Mrs. Heise and her son unquestionably knew of the contract, but notwithstanding such knowledge, if they were innocent of any attempt to defraud plaintiffs, they should not be punished because the husband of one of the defendants and the father of the other failed in business, whereby he was unable to perform the terms of his agreement. If Heise's financial embarrassment necessitated a relinquishment of his interests in the demised premises, or, if his anger, enkindled by being compelled to account for hops which he tried to secrete, or his resentment at what he considered to be exorbitant charges, prompted him to surrender his rights under the leases, plaintiffs' remedy was limited to an action against him for a breach of his agreement, and they cannot recover against his codefendants unless they participated in a scheme to defraud plaintiffs.

2. The relation existing between the defendants imposes upon Mrs. Heise and her son the burden of proving the *bona fides* of the part undertaken by them immediately preceding and during the time they had charge of the hopyards: *Jolly v. Kyle*, 27 Or. 95 (39 Pac. 999); *Feldman v. Nicolai*, 28 Or. 34 (40 Pac. 1010); *Schwartz v. Gerhardt*, 44 Or. 425 (75 Pac. 698).

3. After Heise settled with plaintiffs and received the money due him for the hops which he raised in 1902, he found it impossible to pay the debts which he then owed. It is fair, also, to infer that he was angry with plaintiffs and determined, if possible, to prevent them from securing any further advantages

under their contract with him. His wife, having the duty of supporting and educating her children thus unexpectedly thrust upon her, seems to have undertaken the task with characteristic fortitude, but her very limited means were evidently soon exhausted, and, after about two days of negotiations, she reluctantly acceded to her brother's earnest solicitation to convey to him her interest in the real property which she inherited from her father. Fraternal duty probably prompted E. L. Harris to desire that Mrs. Heise should make good use of the money which she had received, and having also obtained from her husband a relinquishment of all his interest in and rights to the demised premises, he recommended her and her son to take leases thereof and raise hops thereon. We believe that Mrs. Heise's testimony is true, to the effect that the first intimation she received concerning the possibility of the hop-yards being again rented came from her brother, after he had secured her husband's relinquishments of all his rights in the premises, and after she had executed her deed.

Though Heise's resentment towards plaintiffs may have afforded a motive for his desire to renounce his rights under the leases, his lack of sufficient means to continue raising hops was evidently the controlling cause that induced such action; but, whatever the reason may have been that brought about such result, we think the testimony clearly shows that neither his wife nor his son was a party to any scheme, if such existed, to defraud the plaintiffs. Heise performed some labor in cultivating and harvesting hops. He was not a diligent worker, however, if the testimony of Seiwert, hereinbefore quoted, is to be believed. His wife surpassed him in the management of the hopyard, thereby demonstrating that she possessed the greater interest therein, which is a circumstance tending to corroborate her testimony respecting the *bona fides* of the transaction. If Heise had labored faithfully at the business, such work would not necessarily establish the fact that he was the beneficiary of a secret trust or render his wife's money that she had invested in good faith subject to the payment of his debts. In *McCormack Mach. Co. v. Pouder*, 123 Iowa, 17 (98

N. W. 303), Mr. Justice McCLAIN, speaking for the court, in discussing the legal principle arising under similar facts respecting labor performed by a married man, says: "But if, in fact, he saw fit to do just what he did for the purpose of assisting his wife and son in carrying on the farm and realizing profits therefrom, this would not render such profits subject to any extent to the payment of his debts. That a husband can render his services to his wife in the management of property belonging to her without rendering such property subject to the claims of his creditors is well settled in this state." To the same effect is, also, the decision of this court: *King v. Voos*, 14 Or. 91 (12 Pac. 281).

4. This suit was evidently instituted on the assumption that the defendant W. C. Heise had attained his majority. The testimony evinces, however, that he was not quite 21 years old. No question was raised at the trial as to whether or not he had been emancipated, and, as he was permitted to become a party to the leases, we shall assume that his father had given him his time before his grandmother and uncle executed to him and his mother such leases. His minority, under the circumstances supposed, did not render the labor he performed or the hops he helped to produce liable to the claims of his father's creditors: *Flynn v. Baisley*, 35 Or. 268 (57 Pac. 908, 45 L. R. A. 645, 76 Am. St. Rep. 495); *Clemens v. Brillhart*, 17 Neb. 335 (22 N. W. 779).

5. The releases given by Heise to his mother-in-law and to his brother-in-law were not voluntary, for their agreement to forego his obligation to pay them rent was a sufficient consideration for his relinquishments: *Whitman v. Watry*, 31 Wis. 639. So, too, the covenant of Mrs. Heise and her son to pay for the use of the hopyards was an adequate consideration for the execution of the leases to them.

6. We think the testimony clearly shows that Mrs. Heise and her son honestly entered into the contract for the leasing of the yards for their own use and benefit, and not in trust for Heise or any other person, and that it would be inequitable to permit advantage to be taken of the money which she expended

and of the labor which she and her children performed, in cultivating and harvesting the hops, to award against her or such son a recovery of any sum whatever as damages by reason of Heise's failure or refusal to keep and perform his part of the contract with plaintiffs. The testimony, which is uncontradicted, shows that the market value of the hops which Heise agreed to sell to plaintiffs was 24 cents a pound at the time they should have been delivered; that there were raised on the yards originally leased to him 23,040 pounds of hops, for which he was to have received 10 cents a pound, whereby plaintiffs sustained damages to the extent of 14 cents a pound. The court found, however, that the value of such hops at that time was only 22 cents a pound, making the loss sustained by plaintiffs \$2,764.80.

7. The decree will therefore be modified so as to award plaintiffs a recovery against the defendant A. Heise of the sum of \$3,225.60, but in all other respects affirmed; the defendants Rachel E. Heise and W. C. Heise to recover their costs and disbursements on this appeal.

MODIFIED.

Argued 29 March, decided 29 May, 1906.

JACKSON v. BAKER.

85 Pac. 512.

PUBLIC LANDS—CONTRACT TO CONVEY HOMESTEAD—PUBLIC POLICY.

1. A contract by a homestead claimant under the laws of the United States to convey to another such homestead, after obtaining title thereto, is void, as against the public policy of the national government, and cannot be enforced by either party.

ILLEGAL CONTRACT—COURTS—DUTY TO DISMISS.

2. When it becomes apparent in any way during the legal course of a proceeding that a contract sued on is illegal, the action should be dismissed by the court *sua sponte*, even though the objection be expressly waived, the courts being bound not to permit the forms of justice to be used thus for an improper purpose.

RESPECTIVE SITUATIONS OF PARTIES TO ILLEGAL CONTRACTS.

3. All parties to an illegal contract are equally at fault, and none of them have any standing in courts of justice to enforce the contract or to recover any consideration paid under its terms.

From Josephine: HIERO K. HANNA, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by H. W. Jackson against G. W. Baker to recover \$1,000 paid by the plaintiff and his assignor to the defendant in consideration of an agreement by the latter to sell and convey land entered by him as a homestead upon obtaining title thereto. The complaint alleges that in September, 1903, the plaintiff and defendant and one Hamilton were the owners as tenants in common of certain mining property, and that the defendant was in possession of 160 acres of adjoining land, which he had entered under the homestead laws; that at the date mentioned the parties referred to contracted and agreed with one Draper to sell and convey to him the mine and homestead for \$25,000, and that it was agreed between the plaintiff and Hamilton and the defendant that if the entire sum should be paid for the property the former would pay to the latter out of their part of the proceeds \$1,000 in consideration of his transferring to Draper the "legal title" to the land covered by the homestead, but that if he failed, or neglected to make such transfer he would return the money so paid; that thereafter Draper paid the \$25,000 for the property, and plaintiff and Hamilton paid the defendant \$1,000; that defendant never obtained title to the homestead because his entry was subsequently canceled for the reason that the land was mineral in character, and not subject to entry under the homestead laws, and defendant did not and cannot transfer the legal title thereto to Draper; that plaintiff has succeeded to all the rights of Hamilton in and to the money paid by them to the defendant and prior to the commencement of this action defendant promised and agreed to repay the same to him but has failed and neglected to do so.

A demurrer to the complaint because it did not state facts sufficient to constitute a cause of action was overruled, and the defendant answered denying the material allegations, and affirmatively alleging that he only agreed to surrender and relinquish to Draper his homestead entry, and that the consideration for the \$1,000 paid him by Hamilton was such surrender, and certain assessment and development work which

he had done on the mining property. A reply put in issue the new matter pleaded in the answer, and a trial was had before the court, and a jury. At the close of plaintiff's case the defendant moved the court to direct a verdict in his favor, but this motion was overruled, and the cause submitted to the jury who returned a verdict in favor of the plaintiff. From the judgment entered thereon this appeal is taken.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Austin S. Hammond*.

For respondent there was a brief over the names of *Asa Connor Hough* and *Reames & Reames*, with an oral argument by *Mr. Hough*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. There is no bill of exceptions. The only question made on the appeal is that the contract between the plaintiff and Hamilton and the defendant, as alleged and set out in the complaint, is illegal and void as against public policy, and ought not to be enforced by the courts. The substance of the complaint is that the defendant agreed for a consideration paid by plaintiff and Hamilton to convey to Draper the legal title to his homestead after he should obtain title thereto from the United States. Such a contract is illegal and void because against the spirit and policy of the homestead law, and will not be enforced by the courts at the demand of either party thereto: *Kine v. Turner*, 27 Or. 356 (41 Pac. 664); *Oaks v. Heaton*, 44 Iowa, 116; *McCrillis v. Copp*, 31 Fla. 100 (12 South. 643); *Dawson v. Merrille*, 2 Neb. 119; *Mellison v. Allen*, 30 Kan. 382 (2 Pac. 97); *Anderson v. Carkins*, 135 U. S. 483 (10 Sup. Ct. 905, 34 L. Ed. 272).

2. If the illegality appears from the complaint or the plaintiff's case, the court will, at any stage of the proceedings, dismiss the action, although such illegality is not pleaded as a defense, or insisted upon by the parties, and may have been expressly waived by them. It is an objection which the court itself is bound to raise in the due administration of justice, regardless of the wishes of the parties: *Oscanyan v. Arms Co.*, 103 U. S. 261 (26 L. Ed. 539); *Buchtel v. Evans*, 21 Or. 309

(28 Pac. 67); *Ah Doon v. Smith*, 25 Or. 89 (34 Pac. 1093); *Bradtfeldt v. Cooke*, 27 Or. 194 (40 Pac. 1, 50 Am. St. Rep. 701); *Müller v. Hirschberg*, 27 Or. 522 (40 Pac. 506); *Pacific Livestock Co. v. Gentry*, 38 Or. 275 (61 Pac. 422, 65 Pac. 597); *Cullison v. Downing*, 42 Or. 377 (71 Pac. 70); *Kreamer v. Earl*, 91 Cal. 112 (27 Pac. 735).

3. The plaintiff's counsel seems to think that the parties to this litigation were not *in pari delicto*; but, as said by Mr. Justice BREWER in a similar case (*Anderson v. Carkins, supra*): "We are unable to see any distinction in moral status between the man who contracts for the perjury of another, and the one who contracts to commit such perjury."

The judgment is reversed, and the cause remanded, with directions to dismiss the complaint. REVERSED.

Argued 27 March, decided 29 May, rehearing denied 26 June, 1906.

CATLIN v. JONES.

85 Pac. 515.

SALES—PAYMENT AND DELIVERY AS CONCURRENT ACTS.

1. Where a contract requires one party to sell and the other to purchase certain property at a specified price, the payment of the price and the delivery of the property are concurrent acts, and should be simultaneously performed.

SALES—WILLINGNESS OF BUYER TO PERFORM—NEED OF TENDER.

2. Under a contract of sale making payment and delivery concurrent, the buyer cannot claim a default and damages against the seller unless he was able and willing to pay at the time and place appointed; but if he was so able and willing, neither tender nor demand is necessary to support an action for damages.

PLEADING—CURING DEFECTIVE COMPLAINT BY ANSWER—AID.

3. Where an essential fact has been omitted from the complaint, an issue as to such fact made by the answer and reply cures the defect in the complaint. For instance: In an action for damages for failing to deliver chattels as required by contract of sale, a failure to allege in the complaint that plaintiff was ready to accept and pay as required is remedied by a claim in the answer that the plaintiff was not present to receive the property at the time and place specified, which plaintiff denied in the reply.

SALES—TIME OF DELIVERY—DAYLIGHT AND DARKNESS.

4. Under a contract requiring the delivery at a stated time and place of articles requiring inspection and examination, the delivery must be made at such an hour as will permit the inspection to be made by daylight. This rule is particularly applicable to hops, owing to the variations between bales in both quality and condition.

SALES—COMPLETED ACT OF DELIVERY.

5. Under a contract of sale requiring the delivery of property at a stated time and place, the mere physical production of the property at the required place is not a compliance with the contract. The seller or his agent must attend to make the delivery and receive the purchase price.

From Marion: **GEORGE H. BURNETT.**

Statement by **MR. CHIEF JUSTICE BEAN.**

This is an action by Russell Catlin and another against S. W. Jones, to recover damages for the breach of a contract to sell and deliver hops. The complaint alleges that on July 15, 1904, the parties to this action entered into a written contract, by the terms of which the defendant agreed to sell for 14½ cents a pound and deliver to the plaintiffs at Brooks Station, on board cars free of all expense, from 13,000 to 15,000 pounds of hops, to be grown during that season in certain specified yards, and to be of the first average quality for the year and section, and to be put up in new baling cloth, delivery and acceptance to be made between the 1st and 10th of October, 1904; that the defendant had of the hops mentioned in the contract 15,000 pounds or thereabouts, produced upon the premises described and of the kind and quality mentioned; that on the 10th of October, 1904, the plaintiffs sent their agent to defendant to ascertain whether he was ready to deliver the hops, but they were not all then baled or in a deliverable condition, and on the 17th of October, the hops being baled and ready for delivery, the plaintiffs tendered the purchase price thereof, and demanded a delivery, but defendant refused to accept the money or deliver the hops to the plaintiffs' damage in the sum of \$2,025.

The answer admits the contract as alleged, avers that the hops therein stipulated to be sold by the defendant amounted to 14,086 pounds, and for an affirmative defense alleges that prior to October 1, 1904, the plaintiffs sold, assigned and transferred all their interest in the contract in question to T. Rosenwald & Co., who have ever since been the owners and holders thereof; that on October 10, 1904, the defendant had at Brooks Station the hops mentioned in the complaint, ready for delivery,

but that neither Rosenwald nor any one on his behalf was there ready and willing to accept or pay for them; that on the day named defendant was ready and willing to deliver the hops as called for by the contract to the legal owner and holder of such contract, but that there was no one at Brooks to receive the hops or pay for the same on the part of any person whatsoever.

The reply denies the material allegations of the answer and affirmatively alleges that during the year 1904, Rosenwald was a customer of the plaintiffs and they had agreed to sell and deliver to him in October of that year a large quantity of hops; that for the purpose of fulfilling their contract with him, they entered into the agreement with the defendant set out in the complaint and attempted to assign the same to Rosenwald, but when he learned that defendant refused to deliver the hops he declined to accept the assignment and insisted that plaintiffs comply with their agreement, which they were compelled to and did do at great loss and damage to them. Upon the issues thus joined the case was tried to a jury.

It was admitted that the hops in question amounted to 69 bales and weighed 14,086 pounds. The evidence for the plaintiffs tended to show that on October 10, 1904, they sent their agent, Earl Race, to defendant's residence near Brooks to ascertain if the hops were then in a deliverable condition, and to receive them if defendant was ready to deliver; that Race arrived at defendant's place some time after noon and told the defendant that plaintiffs were anxious to receive the hops, and inquired when he would be ready to deliver and he replied "at most any time"; that defendant gave Race a written order permitting him to take samples from the bales of hops which were then in the warehouse at the station at Brooks; that Race went from defendant's residence to Brooks, took samples from the hops then in the warehouse, and remained there until about 4:30 o'clock in the afternoon or thereabouts; that at that time there were only 40-odd bales in the warehouse.

The defendant, as a witness in his own behalf, testified that he told Race that he was then ready to deliver the hops to the plaintiffs; that 40-odd bales were in the warehouse at Brooks Station on the morning of the 10th of October, and had been

for some time previous; that afterward and on that day he caused 29 or 30 bales more to be hauled by his workmen to the warehouse, and placed with the other hops; that he himself was at the warehouse in the forenoon but did not return again that day, and the bill of exceptions recites that there was no evidence "tending to show that defendant, or any person authorized by him was at the place when the hops were stored for the purpose of delivering the same to plaintiffs." There was testimony tending to show that all the hops were baled and in deliverable condition on October 17th, and were worth from 30 to 31 cents a pound; and that on that day the plaintiffs demanded the delivery thereof, and tendered to the defendant the purchase price, but that defendant refused to accept the money or make the delivery. The plaintiffs requested the court to instruct the jury:

"If the defendant did not have the hops at Brooks in time for the plaintiffs to inspect and receive them by daylight, but that he got them there so late that plaintiffs would have had to inspect and receive them after dark or at a time so late in the day that it was not possible to carefully inspect and receive them by the aid of daylight, then the defendant did not comply with that part of the contract which required him to have the hops at Brooks by the 10th day of October, 1904, and his defense on that issue cannot avail him."

This instruction was refused, and the cause was thereupon submitted. After the jury had been out for a time they returned into court and inquired whether it was necessary for the defendant to be at the warehouse on October 10th, after the last load of hops had been hauled in order to make a complete delivery. To this inquiry the court replied:

"I will say to you that the question presented is not within the pleadings. The plaintiffs have charged in their complaint that the hops were not in a deliverable condition, and that is the only ground that they allege as excusing them from paying or offering to pay the money on the 10th and they must recover on that ground or not at all. The question which you propound has nothing to do with the case under the evidence that they have offered."

The verdict was for the defendant, and plaintiffs appeal.

REVERSED.

For appellants there was a brief over the name of *Carson & Cannon*, with an oral argument by *Mr. A. M. Cannon*.

For respondent there was a brief with oral arguments by *Mr. George Greenwood Bingham* and *Mr. Martin Luther Pipes*.

MR. CHIEF JUSTICE BEAN delivered the opinion of the court.

1. By the terms of the contract upon which plaintiffs seek to recover, the payment of the purchase price and the delivery of the hops were made concurrent acts, to be performed at the same time. The defendant was not bound to deliver the hops until they were paid for, nor were plaintiffs bound to pay for them until delivered. Payment and delivery were to be performed simultaneously: *Beauchamp v. Archer*, 58 Cal. 431 (41 Am. Rep. 266); *Meeker v. Johnson*, 5 Wash. 718 (32 Pac. 772, 34 Pac. 148).

2. But, before the plaintiff can recover damages for a breach of the contract, he must show more than the mere default of the defendant. He must show that he was ready and willing to perform his part of the contract by accepting and paying for the hops at the time and place appointed. The hops were to be delivered at a particular place, and if the plaintiffs were ready at the appointed time and place to perform their part of the contract, and the defendant did not have the hops there ready for delivery, the right of action for a breach of contract was complete without a tender of the purchase price or a demand for the hops: *Coonley v. Anderson*, 1 Hill (N. Y.) 519; *Neis v. Yocum* (C. C.), 16 Fed. 168. But if the defendant, as he alleges, had the hops ready for delivery at the time and place specified in the contract, the plaintiffs must show an offer then to receive and pay for them before they can maintain an action for nondelivery.

3. Now, it is not directly averred in the complaint that plaintiffs were ready and willing at the time and place specified to perform the contract on their part, but this omission is cured by the allegation of the answer that defendant had the hops at Brooks Station ready for delivery at a time stipulated, but that there was no one present to receive and pay for them. This averment of the answer is denied by the reply, and an issue

thus made on the plaintiffs' readiness and willingness to perform the contract on their part. Consequently the defect in the complaint is cured by the answer: *Turner v. Corbett*, 9 Or. 79; *Chesapeake & Ohio R. Co. v. Thieman*, 96 Ky. 507 (29 S. W. 357); *Scheney v. Hartford Fire Ins. Co.*, 71 Cal. 28 (11 Pac. 807); *Beckmann v. Phoenix Ins. Co.*, 49 Mo. App. 604. In an action of this kind, readiness and willingness to perform by the plaintiff must be alleged in the complaint, or else it will be had on demurrer, but where such allegation is omitted and the defendant in his answer by way of defense sets up nonperformance by the plaintiff of the terms of the contract, and the plaintiff takes issue upon such averment, the defect in the complaint is helped out or aided by the subsequent pleading. This rule is well illustrated in *Beckmann v. Phoenix Ins. Co.*, 49 Mo. App. 604. That was an action on a policy of fire insurance, and the complaint failed to allege that the plaintiff complied with certain conditions precedent to his right of action. The court said the complaint would have been vulnerable to a demurrer, but that the defendant having by way of defense set up the nonperformance of the conditions precedent on the part of the plaintiff, and plaintiff having taken issue by reply, the defect was cured. The same principle is applied in other cases cited.

4. The questions for determination, therefore, under the pleadings, were (1) whether the plaintiffs were ready and willing at the time and place stipulated to perform the contract on their part by accepting and paying for the hops, and if so (2) whether the defendant was ready and able at that time to comply with the contract by making the delivery. Upon this latter point the instruction requested by the plaintiffs was, in our opinion, correct and should have been given and the inquiry of the jury should have been answered in the affirmative. Where, under the terms of an executory contract of sale, the delivery of bulky articles, such as hops, which require inspection and examination, is to be made at a particular place, tender must be seasonably made so that the vendee, who is bound to attend for the purpose of receiving the property, may have an

opportunity to examine and inspect it by daylight to ascertain whether it complies with the contract: 2 Meachem, Sales, § 1137; *Croninger v. Crocker*, 62 N. Y. 151; *Startup v. MacDonald*, 46 E. C. L. 591. The rule upon this subject is thus admirably stated by Baron Parke, in *Startup v. MacDonald*: "A party who is, by contract, to pay money, or to do a thing transitory, to another, anywhere, on a certain day, has the whole of the day, and if on one of several days, the whole of the days, for the performance of his part of the contract; and until the whole day, or the whole of the last day, has expired, no action will lie against him for the breach of such contract. In such a case the party bound must find the other, at his peril, and within the time limited, if the other be within the four seas; and he must do all that, without the concurrence of the other, he can do, to make the payment, or perform the act, and that, at a convenient time before midnight, such time varying according to the quantum of the payment, or nature of the act to be done. * * But where the thing to be done is to be performed at a certain place, on or before a certain day, to another party to a contract, there the tender must be to the other party at that place; and as the attendance of the other is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day where the thing is to be done on one day, or for the whole series of days where it is to be done on or before a day certain; and, therefore, it fixes a particular part of the day for his presence; and it is enough if he be at the place at such convenient time before sunset on the last day as that the act may be completed by daylight; and if the party bound tender to the party there, if present, or, if absent, be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient." If, therefore, the defendant did not have the hops at Brooks in time for the plaintiffs to inspect them by daylight on the day stipulated for the delivery, he did not comply with his contract and his act is no defense in this case, if in fact the plaintiffs have themselves

complied with the contract so as to entitle them to sue the defendant for nondelivery.

5. Nor would the mere transportation of the hops to Brooks Station be a defense, if the plaintiffs were there ready and willing to accept them, unless the defendant or some one representing him was present to make the delivery and to receive the purchase price. If both parties had been present at the time and place agreed upon and able to perform their respective undertakings, neither could have put the other in default without offering to perform on his part: *Davis v. Adams*, 18 Ala. 264. It was, therefore, incumbent on the plaintiffs, if they were ready and willing to perform the contract and the defendant was likewise ready, to offer to perform before they could maintain an action for a breach, but they were not bound, as Judge DEADY says in *Neis v. Yocum*, 16 Fed. 168, "to go out into the highways and elsewhere to find the seller" to make such offer. It was the duty of the defendant, if he desired to perform his contract, to be present at the time, and the place of performance either in person or by agent so that he could have delivered the hops and received the pay therefor.

Judgment reversed, and new trial ordered.

REVERSED.

Argued 5 April, decided 12 June, rehearing denied 17 July, 1906.

STATE v. MIZIS.

85 Pac. 611, 86 Pac. 361.

CHANGING VENUE—DISCRETION—APPEAL.

1. An application for a change of venue under Section 1250, B. & C. Comp., is addressed to the discretion of the trial court, and its ruling thereon is reviewable on appeal only for an erroneous exercise of its power resulting in a substantial injury to the defendant, which was not the case here.

POSTPONING TRIAL—DISCRETION—APPEAL.

2. The trial court acts under a discretion in passing on applications for postponements of trials, and its decisions will be reviewed on appeal only when there has been a disregard of the rights of the applicants, and in the present instance the application was wisely refused.

ELEMENTS OF THE CRIME OF RIOT.

3. Under B. & C. Comp. § 1913, which defines riot as the use of any force or violence, or any threat to use force or violence, by three or more persons acting together and without authority of law, if accompanied by immediate power of execution, it is not necessary that the three persons do the same act, but the offense is committed if the required number of

individuals have a common purpose to do the act complained of or assist one another to that end, in the manner named, though the individual act of each was separate from that of the others.

RIOT—KIND OF PROOF OF COMMON PURPOSE.

4. Positive direct proof of the common purpose of rioters is not required, but the intent of the parties and the required community of action may be inferred from the circumstances and from the actions of the persons implicated.

EVIDENCE OF RIOT.

5. The evidence of the occurrences charged here is entirely satisfactory to a moral certainty that the defendants were rioters as claimed.

APPEAL—OBJECTIONS NOT MADE AT TRIAL.

6. Objections to evidence not made at the trial are not available on appeal. For example: An objection to impeaching testimony that it was not proper for that purpose will not support an argument that the witnesses did not appear to be qualified.

DEFINITENESS OF TECHNICAL OBJECTIONS.

7. What may be termed technical objections to evidence should always be specific, in justice to the adversary and the court.

TRIAL—STRIKING OUT EVIDENCE.

8. Ordinarily it is not reversible error to refuse to strike out evidence, though improper, unless it was properly and seasonably objected to.

INSTRUCTIONS CONSIDERED AS A WHOLE—RIOT.

9. The instruction on a given point in a charge must be read with the balance of the instructions.

For instance: In a riot case an instruction that each of the defendants must have been "acting in conjunction with not less than two other persons in committing the act" is not open to the objection that it does not limit the "two other persons" to those implicated in the disturbance, where the court elsewhere charged that before any defendant could be convicted it must be found beyond a reasonable doubt, "not only that such defendant participated in the alleged riot, but that at least two of the other persons whose names are stated in the indictment were present at the time the riot occurred, if one did occur, and were acting in concert with the defendant, and that they assembled with a common intent to do the act charged in said indictment." The apparent narrowness of the first charge disappears when the entire charge is considered.

PUNISHMENT FOR RIOT.

10. Under Section 1914, B. & C. Comp., providing that if a felony or misdemeanor shall be committed in the course of a riot, any person participating therein shall be punished in the same manner as a principal in such felony or misdemeanor, and that any participant in such riot who shall carry a dangerous weapon, shall be punished by imprisonment in the penitentiary, every participant in a riot is liable to a penitentiary sentence if any one participant carries a dangerous weapon. In this case the defendant, though unarmed, was present aiding and encouraging others who were committing assaults with dangerous weapons, and was properly sentenced as though he had himself been armed and had committed an assault.

From Douglas: JAMES W. HAMILTON and LAWRENCE T. HARRIS, Judges.

Statement by MR. CHIEF JUSTICE BEAN.

The defendants Tom Leorges and Peter Demas, together with James Pilantes and Anton Mizis and three others, whose names were to the grand jury unknown, were indicted for riot. They were all Greek laborers, engaged with some 75 or 80 of their countrymen in repairing the track of the Southern Pacific Co. at or near Glenbrook, a station about 30 miles south of Roseburg. They were under the charge of foremen and lived in "outfit cars," which, for about a week prior to the commission of the alleged crime, had been standing on the siding at Glenbrook. About 10 o'clock on the night of October 10, 1905, an extra freight train "headed in" on the siding to clear the main track for the north-bound passenger train then about due. It coupled onto the outfit car nearest the switch and pushed it and those connected with it down against the other cars with such force and violence as to cause considerable damage to the furniture and belongings of the occupants. This so enraged the Greeks that a large number of them rushed out of the cars, ran down the track toward the freight train armed with guns, pistols, and other firearms, and began a general fusillade at and in the direction of the freight train and its crew. The fire was returned by one of the brakemen, who secured a gun from a house nearby, and some shots were fired by the foreman. There were fired in all from 75 to 100 shots. During the difficulty the wife of the foreman was killed and one of the Greek laborers injured. The passenger train arrived a short time after the difficulty commenced, when it ceased, and the Greeks returned to their cars. The freight train then backed down to the nearest station and the county officers at Roseburg were notified of the trouble, and the sheriff sent a posse in charge of a deputy to the scene of the difficulty, who arrested and brought all the Greeks to Roseburg, where they were confined in a warehouse guarded by the state militia who had been ordered out by the county judge at the request of the sheriff.

The circuit court, with a grand jury, was in session, and the grand jury, after an investigation of the matter, returned an indictment on the 19th against the defendants for riot, charg-

ing, among other things, that being armed with dangerous weapons, namely, shotguns, pistols and rifles, they made a felonious assault with such weapons on Jesse L. Woodson and Jesse McCulloch, the engineer and fireman of the freight train, by shooting at them. The defendants were arraigned and given until the next morning at 8.30 o'clock to plead.

At that time they appeared by counsel, entered a plea of not guilty, and moved for a change of venue, on the ground that they could not expect a fair and impartial trial in the county. This motion was supported by and based upon the joint affidavit of the defendants and the affidavits of Mr. Voicly, the deputy consul for Greece, residing in San Francisco; Andrew Papageogopoulos, and John Marandas, two Greeks residing in Portland; the latter being a labor agent of the Southern Pacific and Oregon Railroad & Navigation Companies. The affidavit of the defendants states that they are natives of Greece employed by the Southern Pacific Co., and had been so employed for a long time; that there is a strong prejudice among the people of the county against them and their fellow countrymen being so employed, and that such feeling was greatly intensified by the trouble at Glenbrook, that immediately after such trouble they, in company with other of their fellow workmen, were arrested and brought to Roseburg, where they had since been confined and held in custody under guard of the militia; that a large number of persons were in attendance upon the circuit court at the time they were taken to Roseburg, and that the matter of the alleged riot had been discussed by every one in the city, and reports thereof, garbled and in the main untrue, had been carried all over the county by persons in attendance upon the court and by the daily and weekly newspapers of the county and of the city of Portland; that by such means the alleged riot had been given great publicity throughout the entire county to the prejudice of the defendants; that members of the regular panel of jurors had been in Roseburg since the difficulty and had, as affiants believed, conversed with the witnesses for the state and other persons pretending to know the facts in relation thereto, and had freely expressed opinions

concerning the same prejudicial to affiants; that, on account of such reports and of the publicity given the matter, there is great prejudice in the county against the affiants; and that they could not obtain a fair and impartial trial therein. Mr. Voicly says in his affidavit that he came to Roseburg in response to a telegram advising him that 84 Greeks in the employ of the Southern Pacific Co. were under arrest; that upon his arrival he found them confined in a warehouse guarded by the militia; that he made diligent inquiry among the prisoners and citizens of the county and ascertained that there is a strong prejudice against the defendants, on account of which it would be impossible for them safely to go to trial; and that he did not believe a fair and impartial trial could be had in the county. Papageogopoulos states that he came to Roseburg on the 11th of October after the difficulty at Glenbrook; that when he first came he secured a room at a hotel, but when it was discovered that he was a Greek he was compelled to vacate and was unable to obtain another until aided by the sheriff; that during his stay in Roseburg he had found a prejudice among the people against the Greeks so intense that in his opinion the defendants could not secure a fair and impartial trial in the county.

Marandas' affidavit was substantially to the same effect as the others. He attaches thereto articles from the Roseburg papers giving an account of the difficulty. One of these is from the Roseburg Review. It is headed:

"DEATH IN A RIOT.

**"Wife of Section Foreman at
Glenbrook Killed.**

"IS MRS. JOHN A. PETERSEIN.

**"Freight Train Jolts Cars Occupied by
Greeks Who Open Fire—One
Wounded by Brakeman."**

It proceeds to say that, during a riot of Greek section hands, precipitated by the severe jolting of their cars by the freight train, the wife of the foreman was killed and a Greek injured; that the Greeks to the number of 83 were arrested and brought to Roseburg that day and were quartered in the Josephson

warehouse, where they were closely guarded by the militia pending an investigation; that the body of the foreman's wife was also brought and taken to the undertaker's, where an autopsy was held; that complete and accurate details of the difficulty were hard to obtain, but according to reports the Greeks became enraged because the cars occupied by them were struck with unusual severity by the freight train, and armed with rifles, revolvers and shotguns, swarmed out of the cars and made a rush for the freight train, and the engineer and fireman were driven from the engine by a fusilade of bullets which riddled the cab; that the rest of the freight train crew were obliged to flee for safety; that one of the brakemen ran to a nearby house, secured a rifle and returned to the train, giving battle to the Greeks, when he fired four shots, so the story goes, wounding one of the Greeks and causing the rest to disperse; that the foreman and his wife, attracted by the shooting, went to the door of their car to look out, when suddenly three shots were fired in quick succession, one of which pierced the breast of the woman, instantly killing her; that the identity of the person who fired the shot could not be ascertained, but the belief prevails that it was intended for the foreman and was fired by one of the Greeks, as threats had been made against his life; that, as soon as the news of the riot reached Roseburg, a posse of 28 men and a deputy sheriff and the city marshal left in a special train; that when they arrived at Glenbrook they found the Greeks in bed and everything quiet; that the Greeks were brought to Roseburg and unloaded from the cars about noon and placed in the warehouse in charge of the militia, which had been ordered out for the occasion by the county judge at the request of the sheriff; that an autopsy would be held that afternoon and the inquest on the morrow.

Another article was from the Roseburg Plaindealer of the 12th, the headlines of which were:

**"DRUNKEN GREEKS ATTACK AND
KILL THE FOREMAN'S WIFE.**

**"While Under the Influence of Liquor They Create a Bad
Disturbance at Glenbrook, With
Disastrous Results."**

It states that seldom has Roseburg been more aroused than it was by the trouble at Glenbrook Tuesday night; that Foreman Petersein had an extra gang of Greeks surfacing the road, and they went on a big drunk, quarreled with Petersein, and finally cornered him in his car, and, when he attempted to defend himself, shot and killed his wife, who was at his side; that about that time an extra freight train came along and a regular warfare began, the engineer being kept busy dodging bullets until Brakeman Johnson got a rifle from the caboose and began firing in the air, when the Greeks scattered and the trouble soon subsided. It then gives an account of the sheriff's posse going to the scene of the trouble, the arrest and bringing of the Greeks to Roseburg on the special train; that by the time the train arrived at Roseburg a large crowd had congregated at the depot expecting to see trouble, but that the Greeks were meek and submissive and were not in a fighting mood; that the members of the militia were much in evidence and rendered the sheriff valuable assistance in handling the crowd and getting the prisoners to the warehouse, where they will camp until the trouble is over and they are discharged; that several ladies were at the train and seemed to take much interest in the matter; that every available space on top of box cars, warehouses and elsewhere was filled by the crowd to see the sheriff search the prisoners as they were marched up by the soldiers; that it was an orderly crowd, and, although there was thought to be ground for lynching, there seemed to be a desire for the law to take its course, all hoping that the guilty ones would be amply punished. The article then states that an autopsy was had on the remains of Mrs. Petersein, and that the inquest was then in progress and would likely continue throughout the day; that in the meantime the militia had the prisoners in hand, and had kept them safely through the night before, although it was rumored that they would be dynamited; that during the afternoon the 83 Greeks were being marched by the militia to the coroner's inquest and from there to the grand jury room.

Another article was from the Roseburg Review of the 17th, with headlines as follows:

"NO FOREIGN LABOR.

**"Local Merchants Association
Goes on Record.**

"RESOLUTIONS ARE PASSED

**"Asking S. P. Co. to Displace Its Alien
Laborers in Douglas County
With Americans."**

It states that, in accordance with the prevailing sentiment throughout the community, the Merchants' Protective Association has passed certain resolutions, which were published in full, requesting the Southern Pacific Co. to remove all gangs of foreign laborers from the county because they were disposed to insulting conduct on the streets and public highways, to committing larceny from the farmers and those living in the vicinity of their camps, and manifested a general disrespect for law and order.

The remaining article was from the Review of the 19th, purporting to be a reprint of an article from a Portland paper. It was headed:

"AS VIEWED BY TRAINMEN"

and was to the effect that investigation of the trouble had revealed the startling fact that every caboose is an arsenal, and that every freight brakeman and engineman on the road wears a 44-caliber Colt's revolver strapped to his body, as the train crews believed their lives to be in danger from the excitable and ignorant Greeks, and have therefore for some time been taking precautions to defend themselves in any emergency that might arise.

In refutation of the proofs submitted by the defendants in support of their motion for a change of venue, the State filed the affidavit of five of the seven grand jurors that returned the indictment against the defendants, the affidavits of the sheriff and his deputy, and the affidavit of 106 citizens of the county, to the purport and effect that they were each and all residents of the county and were familiar with the feeling and sentiments

of the people in reference to the crime charged against the defendants, and that in their opinion a fair and impartial trial could be had in the county. Upon this showing the court overruled the motion. The defendants then moved for a postponement of the trial until the "next regular term" of the court. This motion was based upon the affidavits previously filed for a change of venue, and the additional affidavit of the defendants' counsel to the effect that neither they nor the defendants were advised of the charge until the indictments were returned late in the afternoon of the 19th; that the defendants were immediately arraigned and given until the next morning at 8:30 in which to plead; that Messrs. Fullerton & Orcutt were not retained as counsel until late in the afternoon of the day the indictments were returned; that the brief time since the arraignment had been consumed in preparing and submitting the motion for a change of venue, and therefore counsel had had no time, since being informed of the nature of the charge, in which to confer with their clients or prepare for the defense. This motion was likewise overruled, and the defendants required to go to trial immediately. The defendant Mizis demanded a separate trial, and it was commenced on the 20th. Seven of the jurors were secured from the regular panel and the remaining five from a special venire of 15. On the 23d a verdict of guilty was returned against him, and the trial of the other defendants jointly commenced. The record discloses no special difficulty in securing a jury. Georges and Demas were convicted on the 25th and the defendant Pilantes acquitted. Motions for new trials in each of the cases were overruled, and judgment entered on the verdicts, and defendants appeal. The two appeals were argued and submitted as one, and will be so treated for the purposes of the decision. The points relied upon for reversal will be noted in the opinion.

AFFIRMED.

For appellants there were briefs and oral arguments by *Mr. Frank G. Micelli*, *Mr. James Corwin Fullerton* and *Mr. Albert Newton Orcutt*.

For the State there was a brief over the names of *Andrew*

M. Crawford, Attorney General, and *George M. Brown*, District Attorney, with oral arguments by *Mr. Brown*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The first point relied upon for reversal is that the court erred in overruling the motion for a change of venue. Where an action for a felony is at issue upon a question of fact, the place of trial may be changed, when it appears by affidavit to the satisfaction of the court that a fair and impartial trial cannot be had in the county where the action is brought: B. & C. Comp. § 1250. But an application for that purpose is addressed to the discretion of the trial court, and its action in granting or refusing the same will not be disturbed on appeal, unless there is manifestly an erroneous exercise of such discretion to the substantial injury of the accused: *State v. Pomeroy*, 30 Or. 16 (46 Pac. 797); *State v. Savage*, 36 Or. 191 (60 Pac. 610, 61 Pac. 1128); *State v. Humphreys*, 43 Or. 44 (70 Pac. 824); *State v. Armstrong*, 43 Or. 207 (73 Pac. 1022).

Upon the showing made in the case there was, in our opinion, no abuse of discretion. The affidavits in support of the motion were all made by non-residents who had been in the county but a few days, and, in the nature of things, could not have been familiar with the general public sentiment. On the contrary, the affidavits filed by the prosecution were by officers, citizens and residents of the county, who all state that they were familiar with the public feeling, and that in their opinion a fair and impartial trial could be had in the county. This view was subsequently confirmed by the fact that no particular difficulty seems to have been experienced in securing a jury. It is true the newspaper articles made a part of the record were inaccurate in many particulars and somewhat sensational, but they were not particularly inflammatory or calculated to so prejudice the citizens of the county against the defendants as to prevent a fair and impartial trial.

2. The next contention is that the court erred in overruling the motion for a continuance. The grounds of the motion were the alleged excited state of the community and the want of

sufficient time for counsel for the defense to prepare for trial. The postponement of a trial, like that of a change of venue, rests in the discretion of the trial court, and its ruling will only be reviewed for abuse: *State v. O'Neil*, 13 Or. 183 (9 Pac. 284); *State v. Hawkins*, 18 Or. 476 (23 Pac. 475); *State v. Howe*, 27 Or. 138 (44 Pac. 672); *State v. Fiester*, 32 Or. 254 (50 Pac. 561). A defendant in a criminal action is entitled as a matter of right to the aid of counsel and to a suitable time after he is informed of the nature of the accusation against him to prepare for trial, and, if the application in this case had been for a postponement for a reasonable time for such purpose, quite a different question would have been presented to the trial court. But the application was to postpone the trial for the term, which would have taken it over until the following January, and there was not sufficient reason shown for such a delay. If counsel desired more time in which to prepare for trial, they should have so advised the court and asked for a postponement for that purpose, and it would probably have been granted. Having confined their application to a request for a continuance for the term, there was no reversible error in denying it.

3. At the close of the State's case, defendants moved the court to direct an acquittal, for the reason that there was no proof of the commission of the crime of riot, or that either of the defendants participated therein. Whatever the definition of a "riot" may be at common law or in other jurisdictions, it is thus settled here by statute:

"Any use of force or violence, or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together, and without authority of law:" B. & C. Comp. § 1913.

To constitute a crime under this statute, there must be: First, the use of force or violence or threats to use force or violence, accompanied by immediate power of execution; second, such force or violence or threats must be by three or more persons acting together; and, third, they must be acting without authority of law. It is, of course, not necessary that the three persons should do the same act in the sense that what one does must be identical with what is done by each of the others to

constitute an "acting together," within the meaning of the statute. It is enough if they have a common purpose to do the act complained of or are engaged in aiding and assisting one another to accomplish such common purpose, although the individual act of each may be separate from that of the other. Otherwise riot is an impossibility. For, as said by Mr. Justice STEPHENS, in *Prince v. State*, 30 Ga. 27: "It is impossible that the action of each shall not have a certain individuality which will distinguish it from the action of all the rest. In tearing down a house, for instance, one rioter breaks down a door, and another breaks down a window, and a third merely hands a crowbar to one of his associates. Here each one's act is different from the acts of the others, and the act of one of them has in it nothing of violence. But there is an obvious legal sense in which they all do the same act. The common intent, which covers all the individual parts in the action, cements those parts into one whole, of which each actor is a responsible proprietor. The part performed by himself is his by perpetration, and the parts performed by the others, in execution of the common intent, are his by adoption. The principle is that each one adopts the performances of all the rest and adds them to his own, and thus does the whole, in the sense of the definition, so long as they are acting in execution of the common intent, but no longer."

4. Nor is it necessary that there should be direct and positive proof of a common purpose, or that the parties should deliberate beforehand or exchange views before entering upon the execution of their design. The purpose and intent may be inferred and found by the jury from the circumstances and the acts committed by them: *United States v. McFarland*, 1 Cranch, C. C. 140 (Fed. Cas. No. 15,674); *United States v. Peaco*, 4 Cranch, C. C. 601 (Fed. Cas. No. 16,018); *Astor Place Riot Case*, 11 Daly, 1.

5. Now, let us apply these principles to the testimony and see whether there was any evidence of a riot and of the defendants' participation therein. Mr. Petersein, the foreman of the gang to which the defendants belonged, testified that, about the

time of the difficulty, he was returning from a nearby house, accompanied by his wife and Assistant Foreman Claudfelder, and as he approached the railroad track he saw a brakeman having some difficulty with his men; that he went to his car, got his rifle and fired several shots into the air and ordered the men to return to their cars, but they did not do so and continued down the track toward the engine; that he immediately heard perhaps 25 or 30 shots fired near or about the engine of the freight train, and from 75 to 100 shots in all, and there was quite a difference in the volume of the sound; that on his way to his car he saw the defendant Mizis armed with a gun in a crowd going in the direction of the engine; that Mizis said they had broken his stove and he was going "to kill the son of a bitch"; that he could not say whether all his men were out of the cars or not, but that most of them were. Claudfelder said that, as he and Petersein came onto the right of way, he looked down the track toward the freight train and saw quite a body of men moving in that direction; that he started to his own car, and, as he did so, passed a number of men going north and recognized Mizis, who was armed with a pistol and said they "had broken his stove and he was going to kill" them; that he saw a number of guns and pistols flash in the moonlight, and just had time to get to his car, when he heard a great number of shots fired in the vicinity of the engine of the freight train, and there was a difference in the volume of the reports; that he was acquainted with Georges and Demas, as they both belonged to Petersein's gang, but he did not see either of them that night.

McCulloch, the fireman of the freight train, testified that, at the time the train pulled in on the siding and stopped, the defendant Georges and 10 or 15 other men came up to the gangway of the engine, and Georges said to the engineer, "Come down, you son of a bitch, if you want to fight," and that he would kill him; that several shots were fired at the engine before witness left it, three passing through the witness' window and one through that of the engineer and the glass was broken out of the front of the cab; that witness examined the engine

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the next day and found marks of bullets and shot, which indicated that the firing had been done from the front. Woodson, the engineer, testified that, about the time or soon after his train came to a stop on the siding, somebody commenced shooting at the engine; that the firing first came from the right side of the cab through the front door and then from the left side; that a number of Greeks, none of whom he recognized, came to the engine, and one of them put his hand on the side of the tank and said to witness, "Damn son of a bitch, I kill you," and invited him to get down from the engine and was mumbling something about upsetting a stove or something of that kind; that, after several shots had been fired at the engine, witness jumped down and started to run toward the caboose, and some one commenced shooting at him and kept it up until he fell into a ditch which crosses the track; that at least eight or nine shots were fired at him from the time he left the engine until he reached the ditch, and that more than 100 shots were fired in all that night; that he examined the engine the next morning and found the shots came through the doors in front, and he also found the impress of a large bullet on the main reservoir under the fireman's seat and grains of shot in the cab and tank box.

Johnson was a brakeman on the freight train, and testified that after the train pulled in on the siding he heard shots up front, and, supposing the head brakeman was having some trouble with "hoboes," started in that direction and met the defendants Georges and Demas in company with several other persons; that Georges grabbed him by the arm and inquired if he was the conductor, and, being answered in the negative, asked where the conductor was, and was told that he was in the caboose; that Georges said, "I kill the conductor," and, "I kill you, you son of a bitch," and slammed him up against a car; that witness broke away from Georges and started to run toward the caboose, and when he got about two car lengths from it some one commenced firing at him, and he dodged between the cars and over to the other side of the train and ran to the caboose and told the conductor that if they found him they

would kill him; that the conductor went out the front door of the caboose, and witness out the rear and ran for the track-walker's shanty; that shots were fired at him all the time he was going there; that at the time Georges told the witness that he would kill the conductor, Demas was standing at his side mumbling something which the witness did not understand; and that Georges and Demas seemed to be the leaders of the crowd, but witness could not say whether either of them was armed or not. Gallings, the conductor of the freight train, testified that, after he was advised by Johnson to leave the caboose, he started to run toward the trackwalker's shanty, and on the way he met Georges, who wanted to know if he was the conductor, and, being answered in the negative, said he would "kill the son of a bitch," and started on toward the caboose; that Georges was armed with a gun of some kind at the time, and although witness did not see any other persons he heard others talking nearby.

There was much additional testimony as to the general character of the difficulty, the number of shots fired, and the like, but this is sufficient to show that there was abundant evidence tending to prove the use of force and violence by three or more persons acting together and without authority of law, and hence the crime of riot; and that the defendants Georges, Demas and Mizis were either actively engaged in such riot or present aiding and assisting others to commit the crime.

A claim is made that the proof does not show that there was any community of action between the defendants, or that either of them did the shooting at the fireman and engineer as charged in the indictment, or assisted, aided or encouraged the same. But there was sufficient proof on both of these points to take the case to the jury. Mizis, in company with a crowd of his fellow countrymen, was seen approaching the engine armed with a gun and was using threatening language toward the trainmen just before the firing began. Georges was at the engine about that time threatening the life of the engineer, and Demas was shown to have been in the crowd a few minutes later actively participating in the difficulty. So the jury were justified in finding

that they were acting together and with a common purpose, and that they either did the firing at the engineer and firemen, or induced or encouraged others to do it. "Riot" is a compound offense, to constitute which there must be a joint action of three or more persons. But all who aid, encourage or promote it by words, signs or other acts are principals and jointly guilty of the offense. It is not necessary that a party should commit some personal violence or do some other physical act, but any act of assistance or encouragement is sufficient to make him a principal. If he is busy while the riot is in progress in guiding, directing, inciting or encouraging others to commit acts of violence, he is as guilty as the instrumentalities he puts in motion.

6. The defendants testified as witnesses in their own behalf. And, for the purpose of impeaching them, the State called Petersein, Claudfelder and Wonacott, who each testified that the general reputations of the defendants for truth and veracity were bad. No objection was made to this testimony when offered or to any of the questions propounded to the witnesses, except the question asked Petersein if he knew the general reputation of Georges for truth and veracity, and the objection then made was that the question was incompetent, immaterial and irrelevant. After the testimony of each of these witnesses had been admitted, counsel moved to strike it out, on the ground that it was not proper impeaching testimony, and an assignment of error is based on the overruling of this motion. The objection now made to the testimony is that the witnesses were not shown to be competent to testify as to the general reputations of the defendants for truth and veracity in the community where they resided. But, as such an objection was not made when the testimony was offered, it cannot avail the defendants at this time.

7. A technical objection which goes to the form of a question or to the competency of a witness to testify as an expert, or on a question of character, should be specific so as to apprise the court and opposite party of the ground of the objection, that they may act accordingly.

8. And, as a general rule, it is not error for a trial court to

refuse to strike out evidence, although immaterial or irrelevant, which has been admitted without objection at the time it is offered: 12 Cyc. 565.

9. It is also claimed that the court erred in instructing the jury that each of the defendants must have been "acting in conjunction with not less than two other persons in committing the act," because the jury might naturally infer that any two persons would answer the requirement. The instruction quoted, however, must be considered in connection with that portion of the charge in which the court told the jury specifically that, before they should convict either of the defendants, they must find beyond a reasonable doubt, "not only that such defendant participated in the alleged riot, but you must also find that at least two of the other persons whose names are stated in the indictment were present at the time the riot occurred, if one occurred," and "were acting in concert with said defendant, and that they assembled with a common intent to do the act charged in said indictment."

There are objections to other parts of the charge, but they are mere verbal criticisms and do not affect the merits.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

Decided 17 July, 1906.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE BEAN delivered the opinion.

10. It is insisted that, because there was no evidence tending to show that Demas carried at the time of the riot a dangerous weapon, he can be punished only by imprisonment in the county jail or by fine. The statute providing the punishments for riot is as follows:

"If any person shall be guilty of participating in any riot, such person, upon conviction thereof, shall be punished as follows:

(1) If any felony or misdemeanor was committed in the course of such riot, such person shall be punished in the same manner as a principal in such crime;

(2) If such person carried, at the time of such riot, any species of dangerous weapon, or was disguised, or encouraged

or solicited other persons who participated in the riots to acts of force or violence, such person shall be punished by imprisonment in the penitentiary not less than three nor more than fifteen years;

(3) In all other cases, such person shall be punished by imprisonment in the county jail not less than three months nor more than one year, or by fine not less than fifty nor more than five hundred dollars." B. & C. Comp. § 1914.

Under this statute, if a felony or misdemeanor is committed in the course of a riot, any person participating therein is to be punished in the same manner as a principal in such felony or misdemeanor, or if the person participating in the riot carries a dangerous weapon at the time, he shall be punished by imprisonment in the penitentiary not less than three nor more than 15 years. In all other cases—that is, where no felony or misdemeanor is committed or where the defendant does not carry a dangerous weapon—the punishment shall be by imprisonment in the county jail or by fine.

Now, in this case the indictment and the proofs show that in the course of the riot an assault with a dangerous weapon was committed upon Woodson and McCulloch, which constituted either a felony or a misdemeanor, and therefore the punishment of any person participating in such riot was the same as that provided by Section 1771, B. & C. Comp., for an assault with a dangerous weapon, which is by imprisonment in the penitentiary not less than six months nor more than ten years, or by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than \$100 nor more than \$1,000. It seems to us clear, therefore, that the defendant Demas was subject to imprisonment in the penitentiary, although he did not carry at the time of the riot a dangerous weapon. He was present, aiding, assisting and encouraging his codefendants to commit an assault with a dangerous weapon, and is liable as a principal. The petition is denied.

AFFIRMED: REHEARING DENIED.

Argued 25 July, decided 28 August, rehearing granted 4 December, 1905;
reargued 18 January, finally decided 8 April, 1906.

MULTNOMAH COUNTY v. WHITE.

81 Pac. 388, 85 Pac. 78.

APPEAL—MOTION TO DISMISS.

1. The consideration of a motion to dismiss an appeal, involving the merits of the dispute, may appropriately be continued until the final hearing.

APPEALABLE JUDGMENT—MEASURE OF RELIEF GRANTED—EQUITY.

2. It is a rule of general application that a party cannot appeal from an order granting the relief which he asks, but if the measure of relief allowed falls short of that obtainable under his complaint, he may seek further relief by appeal.

For example: A county having sued to invalidate an exchange by its judge of sundry tax certificates which it owned for certain void warrants, to have the holders of such certificates declared trustees thereof for the county, to restrain their transfer, to recover the proceeds of any that had been sold, and the amount for which the certificates had been bid in by the county, on the theory that the certificates were still outstanding, is entitled to appeal from a decree merely declaring the entire exchange void, since it had asked for a recovery of the value of such certificates as had been sold, it being shown that most of such certificates had been taken up by the property owners and canceled before the filing of the suit.

EFFECT OF DECREE IN COLLUSIVE SUIT.

3. A collusive proceeding is not binding on parties or privies, and questions there decided may be re-examined upon proof of the prior collusion.

ESTOPPEL TO DENY A RIGHT BY ONE WHO EXERCISED IT.

4. One who has exercised a right conferred by another will not be heard to deny that such grantor had the right in question.

For example: One who has collected money from various property owners for certain tax certificates cannot insist that they were void when called upon to account to the true owner, who claimed that they had been unlawfully obtained from its possession.

RECOVERING CONSIDERATION OF ILLEGAL CONTRACT.

5. Whatever may be the rule between private persons as to recovering a consideration voluntarily paid on an illegal contract with a knowledge of the facts, the consideration so paid can be recovered by a public corporation that has been imposed upon, whether by its officers or others.

For example: Where tax certificates belonging to a county were wrongfully transferred in exchange for void county warrants, the fact that the transfer was voluntary and with full knowledge of the facts is not a defense to a claim by the county for an accounting and a return of all money obtained from sales of such warrants to taxpayers for redemption.

From Multnomah: **ARTHUR L. FRAZER**, Judge.

Suit by Multnomah County against W. F. White and another, resulting in a decree from which plaintiff appeals. A motion to dismiss the appeal was overruled, and a decision rendered on the merits after a rehearing.

MOTION OVERRULED.

REVERSED.

Decided 20 March, 1904.

ON MOTION TO DISMISS THE APPEAL.

Mr. Joseph Simon and Mr. Martin Luther Pipes for the motion.

Mr. Charles Henry Carey, contra.

PER CURIAM: 1. This is a motion by respondents to dismiss the appeal in the above cause on the ground that the appellant, who is plaintiff in the suit, obtained by decree of the circuit court the full relief demanded. The presentation thereof has developed a situation involving somewhat the merits of the controversy, which being so, we have concluded that we may be more fully advised touching the question involved by a further hearing of the motion in conjunction with the cause itself. We will therefore withhold our decision in the premises for the present, and the order of the court will be that the motion be continued until the cause comes on for hearing on its merits, when both will be heard together. MOTION OVERRULED.

Decided on rehearing 3 April, 1906.

ON THE MERITS.

Statement by MR. JUSTICE MOORE.

This is a suit by Multnomah County against the First National Bank of Portland, Oregon, and W. F. White, to set aside the assignment of certain tax certificates. The facts are that the county court of that county audited and allowed claims presented for work purporting to have been done on the public roads therein, and in pursuance of such orders the county clerk issued to the claimants 35 county warrants, aggregating \$5,015.52, which were indorsed by the county treasurer, "Not paid for want of funds," and sold at par, and assigned to the defendant bank, which at the time of such purchase had no notice or knowledge of any fact that would tend to render them invalid. A suit was instituted by one A. H. Maegly, as plaintiff, against the county, the bank, and others, as defendants, and a decree rendered therein February 15, 1897, declaring these warrants void, except as to parts of six of them, on the ground that the claims for which they were given were forged,

and the county and its officers were enjoined from paying them, except the parts thereof so found to be valid, amounting to \$569.37, and the other defendants in that suit, their agents, etc., were restrained from demanding or receiving payment thereof, except as to such parts, from which decree no appeal was taken. Thereafter the defendant White offered for these warrants 25 per cent. of their face value, and, the bid having been accepted, the bank, by its then president, petitioned the county court of Multnomah County to exchange for such evidences of indebtedness, "dollar for dollar," certificates issued upon the sale of real property for delinquent taxes, whereupon there was assigned to the bank, by order of that court, June 5, 1901, 69 certificates, aggregating, with the costs of sale, \$7,218.25. The order last mentioned, referring to the real property set forth in these certificates and to the owners of the respective tracts, contained the following: "Which said pieces and parcels are wrongly described as to either person or property, and therefore said tax assessed against the same cannot be collected by the County of Multnomah, and are of no value." These certificates, by a written request of an officer of the bank, were assigned to White as "agent," without designating his principal. The county court of that county, on May 20, 1903, made an order revoking the assignment of these tax certificates, and eight days thereafter this suit was instituted. The complaint states the facts, in substance, as hereinbefore detailed, and alleges that the county warrants so exchanged were worthless, while the value of the tax certificates received therefor was greater than \$7,215, and that such certificates were assigned without consideration to the defendants, who took and held them as trustees for the plaintiff.

The defendants separately answered, denying the material averments of the complaint, and each alleging new matter as a defense to the suit. The statements of such matter are so nearly identical that the averments of each defendant will be treated as constituting only one answer, to the effect that the County of Multnomah procured Maegly to bring the suit against it and others to have the warrants in question declared void, and paid

him therefor the sum of \$1,216.12; that no controversy was involved in that suit between the several defendants, nor was the decree rendered therein in favor of either of them against any of the others; and that, by reason of the county's employment of Maegly to bring suit in its behalf, the decree thus rendered was collusive and void as to the defendants herein. For a further defense, the manner of issuing the county warrants is set out, and it is alleged that, while the warrants were owned by the bank, a dispute arose between it and the county as to the liability of the latter thereon, whereupon an accord and settlement with each other was made, as evidenced by the order of the county court of June 5, 1901, in pursuance of which the tax certificates were exchanged for the warrants.

A demurrer to the allegations of new matter in each answer was sustained, and, the cause being tried on the remaining issues, the court found the facts as hereinbefore stated, and that all the tax certificates in question had been returned to and canceled by the county clerk, whereupon it treated the assignment thereof as never having been made, and decreed that such transfer was void. The plaintiff appeals, assigning as error, in its abstract, the action of the trial court in refusing to grant the entire alternative relief demanded, to wit: (1) That the defendants be decreed to have taken and held the tax certificates as trustees for plaintiff; and (2) that it be awarded a recovery against the defendants herein, jointly and severally, for the amount of such certificates, costs of sale, and penalties.

REVERSED.

For appellant there was a brief over the names of *John Manning*, District Attorney, and *Carey & Mays*, with oral arguments by *Mr. Charles Henry Carey*.

For respondent, First National Bank, there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with oral arguments by *Mr. Joseph Simon*.

For respondent, W. F. White, there was a brief with oral arguments by *Mr. Martin Luther Pipes*.

MR. JUSTICE MOORE delivered the opinion of the court.*

At a rehearing of this cause plaintiff's counsel insisted that we erred in assuming in our former opinion that the averments of Meagly's employment by Multnomah County, to bring a suit against it to have certain of its warrants declared invalid and the collection thereof enjoined, as alleged in the separate answers, were proved, because demurrers thereto had been sustained. If, on an appeal in equity, the sustaining of a demurrer be considered erroneous, and the truth of the pleading thus challenged thereby established, it would be unnecessary to "assume" the existence of the facts alleged, because they would have been already substantiated in the manner indicated. It seemed to be conceded at the former hearing in this court that Meagly was so employed and paid, and, accepting this supposed admission as being true, a conclusion of law was based thereon to the effect that the decree enjoining Multnomah County was not binding upon it. This deduction was not predicated on any acknowledgment of the facts alleged as new matter in the answers, because demurrers thereto had been sustained, but on the supposed avowal, though it is stated in the opinion heretofore announced that sustaining the demurrers was an implied admission of the facts alleged. This was adverted to as corroborative of what we understood to be the solemn acknowledgment of counsel respecting a material fact.

The decision heretofore reached is reviewed on discovering that a mistake of fact was made in declaring that a valid part of a few of the county warrants formed a consideration for the exchange of the whole thereof for the tax certificates. In the former opinion it is said: "The complaint herein states that the decree in the Meagly case determined that the county warrants were valid to the extent of \$569.37, and, after setting out a list of them, contains the following averment: 'All of which said warrants herein mentioned and referred to are now held and owned by the defendant, the First National Bank of Portland, Oregon.'" It is maintained by plaintiff's counsel that this

*NOTE.—The original opinion is omitted from this official volume, by direction of the court, as it is not now expressive of the court's views.

excerpt refers to a statement of the substance of the decree in the Meagly Case, and not to any averment of fact in the case at bar. A re-examination of that pleading seems to warrant the construction thus placed upon the language used. The mistake of fact in this respect necessarily avoids the conclusion heretofore reached, requiring an examination of the entire cause as upon its original submission.

2. This brings up for consideration the defendants' motion to dismiss the appeal, which question was reserved until the cause could be heard on its merits. It is argued that, as the plaintiff secured in the lower court the full measure of alternative relief sought, it cannot appeal from the decree rendered in its favor. The prayer of the complaint is, in effect, that the order of the county court of Multnomah County, whereby the tax certificates were exchanged, be declared void, and that the defendants received and held the certificates as trustees for plaintiff's use; that they be enjoined from transferring or collecting any of the certificates remaining in their possession and required to show by answer to whom they sold or assigned any of them and the consideration received therefor:

"And that upon such showing a decree be made and entered allowing the plaintiff as relief herein either: (1) A judgment against the defendants, jointly and severally, for the proceeds derived by them and each of them from selling, assigning or collecting the said certificates of sale, and each thereof; (2) a judgment against the defendants, jointly and severally, for the amount of the tax, costs and penalties for which the said several properties were bought by the County of Multnomah at the public tax sale; or (3) decreeing that the County of Multnomah is still the owner and holder of each and all of the said certificates of sale assigned and transferred to the defendants, or either of them, and that neither the said defendants, or any other person to whom the said defendants, or either of them, may have attempted to assign or transfer them, or any of them, have acquired any right, title or interest therein."

The court, having made findings of fact and of law, decreed, in substance, that the transfer of the certificates to the defendants was illegal, and, notwithstanding such attempted assignment, the plaintiff herein had been and was the owner of the certificates and of the real property described therein; that

neither the defendants nor any person to whom they undertook to assign any of the certificates acquired any right, title or interest therein, or to the lands affected thereby; and that the records of Multnomah County, so far as they purported to show an assignment or transfer of the certificates, be canceled.

A party to a suit will not be permitted on appeal to assume a position inconsistent with that taken by him at the trial below, and, if he there obtains the full measure of relief which he asks, he cannot assign as error the action of the court which he invited: *Hume v. Turner*, 42 Or. 402 (70 Pac. 611). It is evident, we think, that plaintiff's counsel supposed, when the complaint was prepared, that the defendants and the persons to whom they assigned the tax certificates were the owners and holders thereof. The transcript shows, however, that nearly all the delinquent taxpayers named in the certificates had paid a part of the sum for which their real property had been sold, whereupon the certificates were returned to the county clerk and canceled, thereby apparently releasing the premises from the effect of the tax sales. In framing the prayer for relief, plaintiff's counsel must have thought that the tax certificates were outstanding, as upon a sale thereof by the county, when in fact they were all canceled, except a few which were returned at the trial. The prayer of the complaint thus assumes a condition which did not exist, and, from this evident mistake of fact, we do not think the plaintiff secured the full measure of the alternative relief which its counsel expected could be obtained. The tax certificates having been returned to the county clerk and canceled, the defendants could not be declared to be the holders thereof as trustees for the use and benefit of the plaintiff, which preliminary decree was a condition precedent to the granting of either form of the alternative relief desired. The evident mistake of fact of plaintiff's counsel, on which the prayer for relief is based, shows that the position taken by them in this court is not inconsistent with that chosen in the court below, where the plaintiff did not secure the full measure of the alternative relief which its counsel reasonably supposed could have been obtained, and hence the appeal should not be dismissed.

3. Considering the case on its merits, little need be said at this time, for, as an error was committed in sustaining the demurrers to the separate answers, the decree must be reversed, and the cause remanded for trial upon the issue as to whether or not Meagly was employed by Multnomah County and received a compensation from it for bringing the suit to have the county warrants declared invalid and the collection thereof enjoined. If he was so employed and paid, the county, by him as plaintiff, in effect, was attempting to maintain a suit against itself as defendant, and, as a party cannot be permitted to assume such dual positions, any decree rendered therein was invalid, and, this being so, the defendant the First National Bank of Portland, Oregon, is not estopped by the injunction or liable to the plaintiff herein, unless the defendant White was its agent in negotiating the assignment of the certificates or in collecting any part of the tax thus represented as delinquent.

4. The defendants offered evidence at the trial tending to show that many of the tax certificates in question were void for various reasons. The trial court, disposing of this matter, held that, as \$4,300 was secured by White from the delinquent taxpayers, the parties receiving the money were estopped to assert the invalidity of the certificates by means of which the sum was collected, and with its finding of facts filed an opinion, a part of which is adopted as the rule applicable to this branch of the case, to wit:

"It is a well settled principle of law that the assignee or licensee of any right, accepted and acted under, is estopped to deny the authority from which the right proceeds. When money has been received either by an agent or joint owner under a contract that is illegal, the agent or joint owner cannot protect himself from accounting for what was so received by setting up the illegality of the transaction in which it was paid to him. Thus, an agent for the collection of a promissory note cannot defend in an action brought by his principal for the amount collected upon the note, either upon the ground that the note was for any reason illegal or that the debt was not justly due. And a licensee of a patent, who has acted under it and received profits from the sale of the patented article, will be estopped to deny the validity of the patent in an action by the patentee to recover royalties or to obtain an account: Bigelow, Estoppel,

552, 553. Applying these principles to this case, it would seem clear that the defendants should not be heard to say that the certificates were illegal, as a defense to plaintiff's claim for an accounting for the money collected thereon."

5. The principle thus announced is opposed to the doctrine asserted by defendants' counsel that, though a contract is without consideration, yet, if it is voluntarily and with full knowledge of the facts executed, the property in the thing, whether money or chattel, is transferred and cannot be recovered, so that a consideration is not an essential part of an executed contract. The rule invoked may be controlling as between private parties, but it can have no application to a municipal corporation which holds its property in trust for the public and is represented by officers, and, if such property is unlawfully sequestered, it may be recovered. If the county warrants in question were wholly valueless, so that no consideration was given for the tax certificates, the parties responsible for collecting the sum received from the taxpayers must account therefor to the plaintiff.

The decree rendered in this court, dismissing the complaint, will therefore be set aside, the cause remanded, with directions to overrule the demurrers, to take further evidence upon the issues involved, and to render a decree as hereinbefore indicated.

REVERSED.

Argued 28 March, decided 29 May, rehearing denied 26 June, 1906.

KABAT v. MOORE.

85 Pac. 506.

PLEADING—PROPRIETY OF MOTION TO MAKE MORE CERTAIN.

1. Motions to make more definite and certain are intended to require additional information as to material matters only, and should not be allowed as to other allegations that may have been included in the pleading.

PLEADING—DENIAL OF "MATERIAL" ALLEGATIONS.

2. Under a statute authorizing general denials, such as Section 77, B. & C. Comp., as amended by Laws 1903, p. 205, it is doubtful whether a denial of the "material" allegations of a pleading is sufficient.

PLEADING—WHEN REPLY IS NOT NECESSARY.

3. Where the new matter of an answer amounts to merely a denial of the material allegations of the complaint, no reply is necessary.

EVIDENCE CONSIDERED.

4. On the question of whether the plaintiff relied on the representations of the defendant and was thereby deceived, the evidence was ample to carry the case to the jury over a motion for a nonsuit.

LETTER BY ATTORNEY AS AN ADMISSION AGAINST INTEREST.

5. A letter written by an attorney to the adverse party concerning his client's interests in dispute cannot be considered as more than an admission against interest, the value of which is a question for the jury.

PRESUMPTION AS TO KNOWLEDGE OF BUSINESS BY A PERSON WHO ENGAGES THEREIN.

6. Generally, a person who engages in a business is presumed to be reasonably familiar with the manner of conducting it, as, a timber locator is supposed to know the corners and lines of tracts that he undertakes to exhibit to prospective purchasers, and the jury may properly be so instructed.

FRAUD—CONCLUSIVENESS OF ORAL TESTIMONY.

7. Fraud is a matter of deduction from all the testimony, and in its determination the jury is not bound by the number of witnesses on either side or the positiveness of their statements.

From Douglas: WILLIAM GALLOWAY, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by Leonard Kabat against Maurice Moore for deceit. The complaint alleges that at all the times therein mentioned defendant was engaged in the business of locating settlers upon vacant government land for a consideration; that on May 18, 1902, he represented to the plaintiff that he knew of a suitable tract of vacant land subject to entry under the homestead laws of the United States, and plaintiff employed him to point it out and run the lines and boundaries thereof, and agreed if the land was as represented by the defendant that he would enter the same and pay defendant \$85 for his services; that under and in pursuance of such agreement defendant took him to a certain tract of land which he represented to be the N. E. $\frac{1}{4}$ of section 34, township 30 S., of range 8 W. of the W. M., and unoccupied public land, subject to entry under the homestead laws, and then and there showed plaintiff a certain tree with markings thereon, which he represented to be a witness tree to the northeast corner of such quarter section, and by the assistance of other persons pretended to run out and locate the lines of such land; that the land thus shown to the plaintiff was a valuable tract, contained several acres of level land, and was suitable for a homestead; that plaintiff was wholly without knowledge of the public surveys or the location of the land or the manner of tracing and locating the lines thereof, but relied

upon the representations of the defendant concerning the same, and, so relying, entered the N. E. $\frac{1}{4}$ of section 34 as a homestead, paying \$22 as fees therefor; that he afterwards built a house and made other valuable improvements upon the land shown him by the defendant and spent considerable time and money in going to and returning from such land, amounting in the aggregate to \$400, with the intention of improving the same with a view to obtaining title thereto from the United States; that after plaintiff had built his house, made his improvements, and spent the time and money as aforesaid, he was advised that such improvements were not on the land entered by him, and he thereupon employed the county surveyor of Douglas County, at an expense of \$17.50, to survey out such land, and it was thereupon ascertained that his improvements were upon the northwest quarter of section 35, and not the northeast quarter of section 34 as represented; that at the time the defendant showed him the land and pointed out the boundaries he well knew that it was not the land of the United States, but belonged to the Oregon & California Railroad Co., and that such representations and statements were made for the purpose and with the intention of wronging, cheating and defrauding the plaintiff out of the location fee; that the land upon which the plaintiff was induced to locate by the false and fraudulent representations of the defendant is a steep mountainside, not suitable for agricultural purposes, and plaintiff could not reside upon or cultivate the same so as to secure title thereto; that by reason of the false and fraudulent representations of the defendant, plaintiff had lost the money paid as the location fee, the amount paid the land office, the value of his improvements, and the money and time expended in going to and from the land, aggregating \$524.50.

Defendant moved to strike out certain portions of the complaint as sham, frivolous and irrelevant, and to make it more definite and certain by setting out the names of the persons who assisted the defendant in running the lines of the land shown by him to the plaintiff. The motion to strike out was sustained, and that to make more definite and certain overruled.

The defendant then answered, denying all the allegations of
(48th Or.—13)

the complaint, except as thereafter alleged. For an affirmative defense he averred that about the 1st day of May, 1902, he was employed by the plaintiff to show him 160 acres of vacant land which he could take under the stone and timber act, and another 160 acres which he could enter under the homestead laws, for which he was to pay the defendant \$85 for each claim; that in pursuance of such employment the defendant did find and show plaintiff two tracts of land, one suitable for entry under the stone and timber act, and the other under the homestead laws; that each of such tracts was satisfactory to the plaintiff, but when they returned to the land office at Roseburg, that selected for a homestead was found to have been filed upon, and thereupon plaintiff solicited the defendant to show him another tract for a homestead; that defendant then said to plaintiff that he knew of only one vacant quarter section, and that if, after examination, it was satisfactory to him, he could have it upon the payment of \$85; that thereafter, and in pursuance of such arrangement, defendant showed plaintiff the northeast quarter of section 34 and pointed out the corners and lines thereof; that plaintiff examined such land and the timber growing thereon until he became fully satisfied, accepted the same, and thereafter filed thereon under the homestead law.

The reply is a denial of "each and every material allegation" of the answer. The defendant moved to make the reply more definite and certain, which motion was overruled, and a trial had before the court and a jury. At the close of plaintiff's testimony the defendant moved for a nonsuit, on the ground that plaintiff had not proven a case sufficient to be submitted to the jury; and also for a verdict in his favor, for the reason that the affirmative matter alleged in the answer was not denied by the reply. These motions were both overruled, and a verdict and judgment rendered in favor of the plaintiff, from which defendant appeals, assigning as error the overruling of his motion to make the complaint more definite and certain, his motion for nonsuit and for a directed verdict, and the giving and refusal of certain instructions.

AFFIRMED.

For appellant there was a brief over the names of *John*

Thomas Long and Geo. M. Brown, with an oral argument by Mr. Long.

For respondent there was a brief with oral arguments by *Mr. James Corwin Fullerton* and *Mr. Albert Newton Orcutt*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. There was no error in overruling the motion to make the complaint more definite and certain. The names of the parties, if any, who assisted the defendant in running out the lines of the property shown to the plaintiff, were immaterial to the cause of action, and it was not necessary that they should be stated in the complaint.

2. The motion to make the reply more definite and certain and for a directed verdict, because it did not raise an issue on the averments of new matter in the answer, was likewise properly overruled. The statute (Section 77, B. & C. Comp.), as amended in 1903, provides that when an answer contains new matter constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation thereof controverted by him: *Laws 1903, p. 205*. It may be doubted whether, under this statute, a reply merely denying each and every "material" allegation of the answer is a good denial, for a plaintiff ought not to assume to himself to determine what facts are material and thus render a conviction for perjury for a false verification difficult or impossible: 1 *Enc. Pl. & Pr.* 782; *Montour v. Purdy*, 11 Minn. 384 (83 Am. Dec. 88); *Lewis v. Coulter*, 10 Ohio St. 452.

3. The question, however, is not important here, because the new matter pleaded in the answer merely negatives the averments of the complaint, and could have been shown under the denials. It does not admit the cause of action as alleged and seek to avoid its force and effect, nor set up a defense or a counterclaim thereto. All the facts alleged were embraced in the judicial inquiry as to the truth of the matter stated in the complaint, and went directly to disprove such facts. The substance of the affirmative matter is that defendant was employed by plaintiff to locate him on a homestead claim; that

in pursuance of such employment he showed plaintiff the northeast quarter of section 34 and truthfully pointed out to him the corners and lines thereof; that defendant made an examination of the premises, and, being satisfied therewith, entered the same under the homestead laws, with full knowledge that he was filing upon the land included within the description. These averments constitute merely a denial of the fraud charged in the complaint, and no reply was required: Bliss, Code Plead. (3 ed.) § 330.

4. It is also contended that the court erred in overruling defendant's motion for a nonsuit on the ground that plaintiff had not proven a case sufficient to be submitted to the jury. The argument is that the evidence does not show that plaintiff relied upon the statements and representations of the defendant as to the location of the land and the boundaries thereof, or that he was deceived thereby. There is no positive and direct evidence that plaintiff relied upon the statements and representations of the defendant, but such is the only reasonable inference that can be drawn from the testimony. Plaintiff was a cigar manufacturer at Roseburg, and unfamiliar with public lands. Desiring to enter 160 acres as a homestead, he applied to defendant, who was in the business of locating settlers upon government land, to ascertain and point out to him a vacant tract subject to entry under the homestead laws, for which service he agreed to pay the defendant \$85. The defendant, in pursuance of this employment, took him out in the mountains some distance from Roseburg, showed him a tract of land which he represented to be the northeast quarter of section 34, from 15 to 18 acres of which was level and suitable for agricultural purposes; that defendant pointed out to the plaintiff what he represented to be the northeast corner of the tract and then stated that he would run out the east line, but, as the country was rough and the plaintiff was not very well, advised him to go by another route to the supposed southeast corner and there await his arrival; and that defendant pretended to run the east line, and, after a time, came to where the plaintiff was waiting for him, and said that the corner

must be near that point. He was unable to find it, but said to the plaintiff that "We'll make a corner," and then proceeded to mark a laurel tree at the point where he said the corner was to be and to run out what he claimed to be the south line of the tract. The plaintiff, without making any further examination or inquiry as to the true lines, and relying upon the defendant's statements in reference thereto, filed on the land, and thereafter proceeded to build a house and make other improvements thereon. He subsequently caused the land to be surveyed, and found that the true east line was 31 rods west of the line shown him by the defendant, and that his house and improvements were off the land filed on some 16 rods, and that none of the level land was on the claim. It is clear, from this testimony, if true—and for the purposes of this motion it must be so taken—that the plaintiff, in filing upon the claim and making his improvements, relied upon the statements of the defendant as to the location of the land and the boundaries thereof, and was thereby deceived and misled to his injury.

5. Considerable prominence is given in this connection to a statement in a letter written by one of plaintiff's counsel to the defendant long after the facts constituting this cause of action had arisen, and in an attempt to adjust the matter, to the effect that plaintiff had had his land surveyed and found that "his house and improvements are not upon the land shown him, but upon a railroad section." The intention of the writer of this letter is perfectly apparent, and his language can hardly be distorted into an admission that plaintiff did not, in fact, build his house or make his improvements upon the land shown him by the defendant, but upon other and different land. But, if it be so construed, counsel who wrote the letter had no authority to bind his client by any such a statement, and at most it could amount to nothing more than an admission against interest, and its value was for the jury.

6. It is also claimed that the court erred in instructing the jury that, as it was alleged in the complaint that defendant was engaged in locating settlers upon vacant government land for hire, he was supposed to know the corners and boundaries

of the land he solicited persons to locate upon and to understand his business "just as much as a physician should his profession if he takes pay therefor." The allegation of the complaint in reference to defendant's being engaged in the business of locating persons on vacant government land for hire was stricken out and therefore, technically, the court was in error in saying that the complaint so stated. The fact, however, appeared from the evidence. He assumed to locate the plaintiff upon a tract of vacant land for which he was to receive and was paid \$85, and he must, therefore, be presumed to understand his business and be responsible for the manner in which he discharged his obligation. There was no reversible error in the instruction as given, as applied to the facts of this case, although some parts of it may be open to criticism as the statement of a general rule.

7. The defendant requested the court to instruct the jury:

"When one or more witnesses affirm the existence of fraud, and an equal number denies its existence and there is nothing to show that one is more creditable than the other, the fraud is not established, and if you find that state of facts from the evidence that has been adduced before you, plaintiff has failed to make out the better case, and your verdict should be for the defendant."

As an academic statement of the law this instruction may be correct under some circumstances, but it is not pertinent in this case. The existence of fraud here is not to be determined from the number of witnesses, but from the entire testimony and the surrounding circumstances. Where fraud is an issue, it is generally to be ascertained from all the testimony and such inferences as may be legitimately drawn from it: *Williamson v. North Pac. Lum. Co.*, 42 Or. 153 (70 Pac. 387, 532). It is seldom that it can be established by the direct and positive testimony of witnesses. It is a question for the jury, who are the judges of the credibility of the witnesses, the weight of their testimony, and the inferences to be drawn from the circumstances attending the particular transaction.

The judgment is affirmed.

AFFIRMED.

Decided 17 July, rehearing denied 9 October, 1906.

MADDEN v. WELCH.

86 Pac. 2.

DEFECTIVE PLEADING—AIDED BY VERDICT.

A pleading not fatally defective will be aided by a verdict, so that it will be considered sufficient on appeal.

For instance: A complaint showing that between certain dates plaintiff furnished to defendant feed and care for his horses of a stated value, that payment had been demanded and refused, and that the sum stated was due, which is defective in that it does not show either a request by defendant or a promise to pay, is aided by a verdict for plaintiff, on an answer denying the allegations of the complaint, and will be sufficient on appeal.

From Malheur: GEORGE E. DAVIS, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by J. E. Madden against Frank Welch, which was originally commenced in a justice's court. The complaint, omitting the formal parts, alleges:

"That between the 1st day of January, 1900, and the 25th day of February, 1905, plaintiff furnished defendant horse feed, consisting of hay and grain, and care and attention for defendant's horses, consisting of feeding and stabling said defendant's horses, to the reasonable amount of \$52.68; that plaintiff has often demanded payment of said sum from defendant, but defendant has ever failed and refused to pay the same or any part thereof; that said sum of \$52.68 is now due and owing from defendant to plaintiff."

Judgment is demanded for such amount. A demurrer to the complaint, because it does not state facts sufficient to constitute a cause of action, was overruled by the justice, and defendant answered over, denying the material allegations thereof, but made no further appearance in the justice's court. Judgment was there rendered in favor of plaintiff for the amount prayed for in the complaint. An appeal was taken to the circuit court, where the demurrer was again overruled, and trial had before a jury, resulting in a verdict in favor of the plaintiff. From a judgment entered on such verdict, the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *W. R. King* and *William Henry Brooke*, with an oral argument by *Mr. Brooke*.

For respondent there was a brief and an oral argument by *Mr. C. McGonagill*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The only point made on this appeal is that the complaint does not state facts sufficient to constitute a cause of action, because it does not allege either a request by the defendant to plaintiff to furnish the horses feed, etc., or a promise to pay for the same. But this is a mere defective statement of a cause of action, and was cured by the verdict. A verdict will cure an imperfect statement, or the omission of formal allegations, although it will not supply a total omission to state some fact essential to the cause of action. The rule is that "whenever the complaint contains terms sufficiently general to comprehend a matter so essential and necessary to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of a statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same, whether the allegation of the complaint is complete or imperfect. But, if a material allegation going to the gist of the action is wholly omitted, it cannot be presumed that any evidence in reference to it was offered or allowed on the trial, and hence the pleading is not aided by the verdict": *Booth v. Moody*, 30 Or. 222 (46 Pac. 884); *Houghton v. Beck*, 9 Or. 325; *Aiken v. Coolidge*, 12 Or. 244 (6 Pac. 712); *Gschwander v. Cort*, 19 Or. 513 (26 Pac. 621). Now, the issue joined in this case was such as necessarily to require on the trial proof that the feed and care charged for by the plaintiff had either been furnished at the request of the defendant or he had promised to pay for the same, and without such proof it is not to be presumed that the court would have permitted a verdict in favor of the plaintiff, or that the jury would have found such a verdict.

Judgment affirmed.

AFFIRMED.

Argued 1 March, decided 29 May, 1906.

JENNING v. MILLER.

85 Pac. 517.

**SPECIFIC PERFORMANCE OF CONTRACT TO LEASE—STATUTE OF FRAUDS—
ACT CONSTITUTING PART PERFORMANCE.**

The part performance of a contract that will avoid the effect of the statute of limitations must be an act done in pursuance of the contract and referable to it solely as an actuating cause; a collateral act done in reliance on the contract, however prejudicial, is not enough.

This case illustrates the rule: A tenant who had secured an option on another store in anticipation of having his tenancy terminated by the expiration of his lease, and afterward orally agreed with the landlord for a continuation of the former lease for three years, cannot claim that his forfeiture of the option and his continued occupation of the old store were part performance of the oral agreement, even though he is not able to obtain any location when the landlord repudiates such agreement, since neither act is in execution of the oral lease solely, the continued occupation being referable to the old lease and the forfeiting of the option being wholly collateral.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by Henry Jennings & Sons, a private corporation, against Ernest Miller to enjoin an action of forcible entry and detainer and for the specific performance of a parol contract for the leasing of real property. The plaintiff is a corporation engaged in the furniture and carpet business in the City of Portland with an investment of about \$75,000. Its furniture and carpet departments are separate, but under the same general management, and it is therefore important that they should be as accessible to one another as possible. For some time prior to February, 1904, the plaintiff occupied two stores at the northeast corner of First and Yamhill streets, known as Nos. 174 and 172. The former was used for the furniture department, and the latter for the carpet department, and there was an opening or passageway between them. The plaintiff had a lease for three years on No. 174, but was a tenant from month to month of No. 172, paying therefor a rental of \$80 a month. In January, 1904, it learned that No. 172 was about to be sold, and that it would probably have to vacate and move its carpet business elsewhere. Its officers thereupon began looking about for a suitable building near and convenient to its furniture department into which it could

move its carpets and curtains. The most desirable vacant building for that purpose was across the street, and they entered into negotiations with the agent or owner for a lease thereof, and had practically agreed upon its terms, although no definite or binding contract had been entered into, when the defendant became the purchaser of No. 172. Negotiations were thereupon had between the plaintiff and the defendant for the leasing by the plaintiff of the premises purchased by the defendant, and such negotiations resulted in some sort of an agreement by which the plaintiff continued to occupy the premises, and gave up and surrendered, with the defendant's knowledge, its option on or contract for the other building. The parties disagree as to the terms of the leasing. The plaintiff alleges and gives testimony tending to show that it was understood and agreed that the lease should be for three years at the same rental it had been paying the former owner, and that, relying upon such contract and agreement, it continued to occupy the building and abandoned its efforts to secure another location, and gave up its option or contract on the room across the street. The defendant, however, denies the contract as set up by the plaintiff and says that the understanding was that the lease should only extend to such time as he should need the premises, and that there was no agreement as to the amount of the rent. The plaintiff continued in possession paying \$80 a month rent, which was accepted by the defendant, until December 31, 1904, when the defendant commenced an action of forcible entry and detainer, whereupon plaintiff commenced this suit to enjoin the prosecution of such action, and for the specific performance of the oral contract of leasing, alleging that it was then impossible for it to secure a suitable building near its furniture department for its carpets and curtains, and that if it was compelled to vacate No. 172 it would be greatly damaged. Upon the trial the suit was dismissed, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Bauer & Greene*, with an oral argument by *Mr. Thomas Gabbert Greene*.

For respondent there was a brief and an oral argument by *Mr. John Francis Logan*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

That the contract sought to be enforced in this suit, assuming it to be as plaintiff has alleged, was void under the statute of frauds because not in writing is unquestioned: *B. & C. Comp. § 797*; *Pulse v. Hamer*, 8 Or. 251; *White v. Holland*, 17 Or. 4 (3 Pac. 573); *Rosenblat v. Perkins*, 18 Or. 156 (22 Pac. 598, 6 L. R. A. 257). But the plaintiff contends that there has been such a part performance as will take it out of the statute. The acts relied upon for this purpose are the possession of the leased premises by the plaintiff and the abandonment by it of the attempt to secure another storeroom, and especially its surrender or release of its right or option on the room across the street, and its inability to secure another. But these are not sufficient to avoid the effect of the statute. The possession by the plaintiff was a mere uninterrupted continuation of its former possession without any change whatever, and under all the authorities this is not enough. The rule on this question is thus enunciated by Mr. Pomeroy, who, after pointing out that if the possession can naturally and reasonably be accounted for upon some supposition other than that of the contract it will not be a part performance, says: "This rule has its most frequent application to cases in which the possession is not a new fact, but is the uninterrupted continuation of a former condition. It results as a necessary corollary from the rule itself that such a possession—one, that is, which merely prolongs a pre-existing situation of the party in reference to the land—cannot alone be a part performance of an intervening contract, since it will be accounted for by the prior condition as naturally as by the new agreement. If, therefore, a verbal agreement is made by a lessor with his tenant, either during the tenancy or after its termination, to grant another lease in place of the existing one, or to renew the lease after the expiration of the prior one, or to sell and convey the land itself, the possession of the tenant continued as under the former holding

cannot of itself be a part performance of the agreement. If the original tenancy has not expired, the possession must, of course, be referred to that; if it has expired, the possession will more naturally be accounted for by the tenant's holding over than by a new contract. As has already been shown, such possession does not raise a presumption as to the intent of the possessor, as is the case where he is an entire stranger to the estate; it must be accompanied by some further act on the part of the tenant in order to stamp its character and connect it with the contract": Pomeroy, Spec. Perf. (2 ed.), § 124. The same doctrine is laid down by the text-writers and the adjudged cases generally: Waterman, Spec. Perf. § 274; Brown, Stat. Frauds (5 ed.), § 476; *Wood v. Thornly*, 58 Ill. 470; *Koch v. National Union Build. Assoc.*, 137 Ill. 497 (27 N. E. 530); *Swales v. Jackson*, 126 Ind. 282 (26 N. E. 62); *Mahana v. Blunt*, 20 Iowa, 142; *Rosenthal v. Freeburger*, 26 Md. 80; *Spalding v. Conzelman*, 30 Mo. 177; *Emmel v. Hayes*, 102 Mo. 186 (14 S. W. 209, 11 L. R. A. 323, 22 Am. St. Rep. 769); *Bigler v. Baker*, 40 Neb. 325 (58 N. W. 1026, 24 L. R. A. 255); *Johnston v. Glancy*, 4 Blackf. (Ind.) 93 (28 Am. Dec. 45).

The abandonment and giving up by the plaintiff of its option or right to the storeroom across the street and its ceasing its efforts to secure another building were not in pursuance of, or in execution of, any contract with the defendant, although it may have been in reliance thereon. It was no part of the alleged contract of leasing that the plaintiff should surrender or give up its option on the other storeroom and the defendant made no contract or agreement in reference thereto. An act of part performance to take a case out of the statute of frauds must be done in pursuance of, or in execution of, the contract alleged, or must obviously be related to or connected therewith, and must be referable solely to such contract. A mere collateral act, disconnected with the agreement, although done in reliance thereon and although prejudicial to the plaintiff, known to the defendant, and incapable of adequate compensation in damages, will not suffice: Brown, Stat. Frauds (5 ed.), § 457. "If," says Mr. Pomeroy, "a plaintiff should, relying upon a verbal agree-

ment, and with the defendant's knowledge, do something prejudicial to himself in a manner and to an extent not susceptible of compensation in damages, but unconnected with that agreement and not in execution of its provisions, this would fall far short of being the part performance required by the rule, in order to admit the remedial jurisdiction of equity": Pomeroy, Spec. Perf. (2 ed.) § 109. This principle is illustrated by the case of *Graves v. Goldthwait*, 153 Mass. 268 (26 N. E. 860, 10 L. R. A. 763). The plaintiff and her sisters were tenants in common of real estate. The plaintiff made an oral agreement with them by which she was to pay each a certain sum, and they were to convey to her their right and title to the premises. Five of the sisters, relying upon each and all of these agreements, released their respective interests in the land to the plaintiff, and the stipulated sums were paid. The defendant, however, refused to carry out her contract. In a suit against her for specific performance it was contended by the plaintiff that she had so changed her position by relying upon the defendant's promise that she could not be restored to her original situation and that the injury which would result to her if the defendant failed to carry out her contract was such a fraud as enabled her to invoke the remedial jurisdiction of equity. The court, however, refused to specifically perform the contract on the ground that the purchase of the rights of the other sisters even in reliance on defendant's promise was not in part performance of the contract with the defendant but was purely a collateral matter. So, in the case under consideration, the giving up by the plaintiff of its right or option on the other storeroom was not in performance of, or in pursuance of, any contract with the defendant, but was entirely a collateral matter, and, therefore, not sufficient to take the case out of the statute of frauds.

The decree is affirmed.

AFFIRMED.

Argued 3 April, decided 29 May, 1906.

AUSTIN v. VANDERBILT.

85 Pac. 519.

TROVER—SUFFICIENCY OF COMPLAINT.

1. In an action of trover it is sufficient to allege the ownership of the property and the right to its possession, together with the fact of conversion by defendant, and the damage, without particularly stating the acts constituting the conversion or the means of their accomplishment.

TROVER—TENDER OF DEBT AFTER CONVERSION.

2. Where a pledge has been converted by the pledgee and cannot be returned, the pledgor need not tender the amount of the debt secured as a condition of bringing an action for conversion.

TROVER—MEASURE OF DAMAGES—COMPETENT EVIDENCE.

3. The value of property at the time of its conversion is the measure of damages in trover, but evidence as to the value a reasonable time before and after that date is competent.

APPEAL—BILL OF EXCEPTIONS—PRESUMPTION AS TO ERROR.

4. Error is not presumed, but must affirmatively appear from the bill of exceptions.

For instance: In an action for the conversion of diamonds, the admission of evidence as to the value of flawless diamonds cannot be considered as error unless the bill of exceptions shows that the stones in question were not of that kind.

From Multnomah: MELVIN C. GEORGE, Judge.

Statement by MR. JUSTICE MOORE.

This is an action by Aimee Austin against Oscar Vanderbilt to recover damages for an alleged conversion of personal property. The complaint states that, October 30, 1902, at Los Angeles, Cal., the plaintiff was the owner and possessed of one pair of 6-carat solitaire earrings, pure white, of the value of \$900, and also of one horseshoe pin, set with 11 diamonds, of the value of \$285, which she then and there delivered to the defendant; that she thereafter demanded of him possession of such property, but he refused to comply therewith, and converted it to his own use, to her damage in the sum of \$1,185. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been overruled, an answer was filed denying the material allegations of the complaint, and averring that the diamonds were delivered to the defendant as security for a loan of \$200; that, plaintiff having failed to pay any part of that sum, he gave her a written notice, July 30, 1903, that in 30 days he would sell such prop-

erty to the highest bidder; that pursuant to such notice he sold the diamonds mentioned for \$255, which was the full value thereof, to A. McPhail of Chicago, Ill.; that defendant, retaining the amount of his debt, tendered to plaintiff in writing \$55, which she refused to accept, whereupon he deposited that sum in court for her. The reply denied the allegations of new matter in the answer, and, the cause being tried, the jury found for the plaintiff, assessing her damage at \$726, less \$200 loaned to her by the defendant, and, judgment having been rendered on the verdict for \$526, the defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *A. King Wilson* and *O. A. Neal*, with an oral argument by *Mr. Wilson*.

For respondent there was a brief and an oral argument by *Mr. Arthur Carpenter Emmons*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is contended that the complaint should have alleged the substance of the contract, respecting the delivery of the diamonds, and averred wherein it had been violated by the defendant, but not having done so, the pleading assailed failed to state facts sufficient to constitute a cause of action, which defect was not waived by answering over. In *Müller v. Hirschberg*, 27 Or. 522 (40 Pac. 506), it was held that an allegation of the facts now insisted upon was unnecessary in an action of trover, Mr. Chief Justice BEAN saying: "The material averments in an action of this character are ownership and right to the possession in plaintiff, and that the defendant wrongfully took and converted the property in question to his own use, or that, being lawfully in possession thereof, he so converted it." The conclusion thus reached is amply supported by the adjudged cases (21 Ency. Pl. & Pr. 1053), which hold that it is sufficient, in an action of trover, to allege in the complaint the conversion as a fact, without stating the particular acts constituting the unauthorized assumption and exercise of the right of ownership over the plaintiff's goods and personal chattels to the exclusion of his dominion over them: 21 Ency. Pl. & Pr. 1077. Whether it is necessary to the maintenance of an action of this character

to allege a tender of the sum loaned, to secure the payment of which the property was pledged, will be considered in connection with the contention that the court erred in denying a motion for a nonsuit and also in refusing to instruct the jury to find for the defendant.

2. An examination of plaintiff's pleadings would seem to show that her theory was that the delivery of the diamonds was a mere naked bailment; but, as the jury found that she owed the defendant \$200, we shall adopt his hypothesis, that the delivery of the jewels to him was a pledge to secure the payment of that sum. The bill of exceptions contains the following statement:

"There was no evidence introduced at the trial of any demand to repay any loan, or of any tender of any money by plaintiff to defendant."

So that a consideration of the questions of averments and of proof of tender become important. In *Halliday v. Holgate*, L. R. 3, Ex. 299, one Bentley borrowed of the defendant a sum of money, to secure the payment of which he deposited scrip certificates for certain shares of stock in a mining company, Bentley became a bankrupt and absconded, whereupon the defendant, without demand or notice, sold a part of the certificates. The plaintiff, as the bankrupt's assignee, not having tendered any of the debt, brought an action of trover against the defendant, to recover the value of the shares disposed of, and it was held, affirming the decision in *Donald v. Suckling*, L. R. 1 Q. B. 585, that, assuming the sale to be wrongful, as the immediate right to the possession of the shares of stock was not by the sale re-vested in the plaintiff, he could not maintain trover, either for the whole value of the shares or for nominal damages, thereby substantially overruling the decision in *Johnson v. Stear*, 15 C. B. (N. S.) 330. In *Halliday v. Holgate*, Mr. Justice WILLES, speaking for the Court of Exchequer Chamber, in discussing the question, says: "It is true the pledgor has such a property in the article pledged as he can convey to a third person, but he has no right to the goods without paying off the debt, and until the debt is paid off the pledgee has the whole present interest. If he deals with it in a manner other

than is allowed by law for the payment of his debt, then, in so far as by disposing of the reversionary interest of the pledgor he causes to the pledgor any difficulty in obtaining possession of the pledge on payment of the sum due, and thereby does him any real damage, he commits a legal wrong against the pledgor. But it is a contradiction in fact, and would be to call a thing that which it is not, to say that the pledgee consents by his act to revest in the pledgor the immediate interest or right in the pledge, which by the bargain is out of the pledgor and in the pledgee. Therefore for any such wrong an action of trover or of detinue, each of which assumes an immediate right to possession in the plaintiff, is not maintainable, for the right clearly is not in the plaintiff." The doctrine thus announced in England prevails in some of the states of the Union.

In *Cortelyou v. Lansing*, 2 Caines' Cas. 200, however, a different rule was adopted where it was held that, if a pledgee sells the pledge before application is made to redeem it, he is answerable in damages for the value of the property converted, and that it is not necessary in such case to make an actual tender of the sum due, to secure the payment of which the property was delivered to the pledgee. In deciding that case Mr. Justice KENT, assigning a reason for the conclusion thus reached, observes: "But when one party has incapacitated himself to perform his part of the contract, there is no need of the other coming forward at the time to make a tender, or to show himself in a capacity to pay, because it would be a nugatory act which the law will never require. If the one party discharges the other from a performance, by saying he will not perform on his part (and voluntarily and notoriously rendering himself unable to perform his part is equivalent to such discharge), it is well understood that it is not necessary for the other party to go forward." The rule established in that pioneer case is tersely stated by Mr. Milburn as follows: "If the property has been converted by the pledgee, no tender of the debt secured need be made by the pledgor before bringing an action against the pledgee": 22 Am. & Eng. Enc. Law (2 ed.), 874. Judge Story, in his work on Bailments (8 ed. (48th Or.—14)

§ 349), in speaking of the recovery of compensation for injury sustained by reason of the conversion of a pledge, remarks: "But, if an action is brought, the pledgee may recoup his debt in the damages." In addition to the cases cited by Mr. Milburn, as supporting the text quoted, see the following: *Hallack L. & M. Co. v. Gray*, 19 Colo. 149 (34 Pac. 1000); *Wilson v. Little*, 2 N. Y. 443 (51 Am. Dec. 307); *Rush v. First Nat. Bank*, 71 Fed. 102 (17 C. C. A. 627); *Waring v. Gaskill*, 95 Ga. 731 (22 S. E. 659); *Glidden v. Mechanic's Nat. Bank*, 53 Ohio St. 588 (42 N. E. 995, 43 L. R. A. 737); *Feige v. Burt*, 118 Mich. 243 (77 N. W. 928, 74 Am. St. Rep. 390); *Work v. Bennett*, 70 Pa. 484.

The pledgee impliedly agrees faithfully to hold the pledge until the conditions have been performed upon the faith of which the choses in action, goods, or personal chattels have been delivered to him. If, in violation of his trust, he sells or disposes of the pledge, thereby putting it out of his power to return the property, it would be useless to impose upon the pledgor the burden of tendering to the pledgee the payment of the debt, or the performance of the duty before he could maintain an action against the pledgee for the damages sustained by reason of the conversion, when it would be impossible for the latter to discharge the obligation which he had undertaken. When a pledgee, by his overt act, violates the terms of his agreement, so that it cannot be specifically enforced, he necessarily severs the fiduciary relations he assumed towards the pledgor, whose remedy against him in this form of an action for the injury sustained, though treated as one for conversion, is in reality founded on the breach of the contract: *Glidden v. Mechanic's Nat. Bank*, 53 Ohio St. 588 (42 N. E. 985, 43 L. R. A. 737.)* The statement that the rules of law, which are founded in reason, do not require the performance of vain things, has been so often repeated as to become almost a general maxim, invoking which we think there was no necessity to allege in the complaint, or to prove

*NOTE.—See with this case an extensive note, Pledgee's Conversion of Pledged Property by Invalid Sale. REPORTER.

at the trial a tender of any sum by the plaintiff to the defendant as a condition precedent to this right to maintain this action.

3. A. Feldenheimer, who, as plaintiff's witness, testified that he had bought and sold diamonds for several years and knew the value thereof, was permitted, over objection and exception, to state the highest market value from October 30, 1902, to the time of trial, of two pure white flawless diamonds, one weighing a trifle less and the other a little more than three carats, and also to specify the rate of increase in the value of such jewels in the interim, and it is contended by defendant's counsel that an error was committed thereby. The value of property at the time of its conversion is generally the measure of damages in an action of trover. To ascertain that value, however, evidence of its worth a reasonable time prior and subsequent to the conversion is admissible: *Douglass v. Kraft*, 9 Cal. 562; *Hamer v. Hathaway*, 33 Cal. 117; *Denton v. Smith*, 61 Mich. 431 (28 N. W. 160); *Kendrick v. Beard*, 90 Mich. 589 (51 N. W. 645); *Gauche v. Milbrath*, 94 Wis. 674 (69 N. 999).

4. We think no error was committed as alleged, nor in permitting the witness to testify concerning the value of "flawless" diamonds; for the bill of exceptions does not disclose that the jewels which plaintiff delivered to the defendant were not of that quality.

These considerations necessitate an affirmance of the judgment, which is ordered.

AFFIRMED.

Argued 17 Oct. decided 27 Nov. 1905; rehearing denied 20 March, 1906.

SPRAGUE v. JESSUP.

4 L. R. A. (N. S.) 410; 83 Pac. 145; 84 Pac. 802.

SPECIFIC PERFORMANCE—EVIDENCE OF MENTAL CONDITION.

1. The mental condition of a party against whom specific performance of an oral contract to convey is sought is a circumstance to be considered as discrediting the transaction.

EVIDENCE CONSIDERED.

2. The evidence under consideration establishes a parol agreement, as claimed by plaintiffs.

SPECIFIC PERFORMANCE—CERTAINTY OF CONTRACT.

3. A parol contract must be clearly established in its terms and details before a court of equity will undertake to specifically enforce it.

SPECIFIC PERFORMANCE—EFFECT OF DENIAL OF CONTRACT BY DEFENDANT.

4. The mere denial of a contract by one against whom it is sought to be enforced will not prevent its specific performance if the court is satisfied of the terms of the agreement.

STATUTE OF FRAUDS—POSSESSION AS PART PERFORMANCE.

5. Possession of real property by the purchaser under a verbal contract, in connection with payment of part of the purchase price and a tender of the balance, is such a part performance of the contract as to avoid the statute of frauds and support a decree for specific performance.

SPECIFIC PERFORMANCE—QUANTUM OF PROOF OF CONTRACT.

6. Before specific performance of an oral contract will be decreed, the terms thereof must be fully and satisfactorily shown to be certain and unambiguous.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by George D. Sprague and others against Sophronia Jessup to enforce the specific performance of an alleged oral agreement to convey real property. The facts are that the defendant, Mrs. Sophronia Jessup, a widow, was on January 13, 1902, the owner in fee of the east half of lots 7 and 8 in block 7, in the City of Salem, the possession of which she delivered to Mrs. Margaret Fennell, who, on the following day, moved into the house on the land, which she occupied until September 20, 1903, when she died intestate, leaving two sons, two daughters, and three grandsons, the latter being the children of a deceased daughter, all of whom, since the death of their ancestor, have had control of the premises. Mrs. Jessup commenced an action against these heirs and their tenants April 8, 1904, to recover the possession of the real property, and the defendants therein having answered, also as plaintiffs herein, filed a complaint, in the nature of a cross-bill in equity, alleging that the possession of the premises was delivered to Mrs. Fennell pursuant to the terms of a parol contract, whereby Mrs. Jessup stipulated to convey the land to her March 1, 1902, by a good and sufficient deed, in consideration of \$5,350, of which sum \$200 was paid January 13, 1902, \$2,500 was payable March 1st of that year, and the remainder March 1, 1903, the last payment to be secured by a mortgage of the real property, and to bear interest for one year; that Mrs. Fennell, on March 1, 1902, tendered to Mrs. Jessup \$2,500, and also offered to execute the mortgage spe-

cified, but the latter refused to make the deed, whereupon the entire sum, including interest, was deposited with the clerk of the circuit court for Marion County as a consideration for the conveyance. The answer denied the material allegations of the complaint, and, the cause being tried, Mrs. Jessup was required to execute to the heirs of Mrs. Fennell a warranty deed to the premises, from which decree she appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. L. H. McMahan*.

For respondents there was a brief with oral arguments by *Mr. P. H. D'Arcy* and *Mr. G. G. Bingham*.

MR. JUSTICE MOORE delivered the opinion of the court.

It is admitted that the sum of \$200 was received by Mrs. Jessup January 13, 1902, but it is insisted by her counsel that this sum was paid on account of the purchase of certain carpets, furniture, etc., that the possession of the premises was delivered to Mrs. Fennell pursuant to a lease thereof, and that no agreement was entered into for the sale of the real property. These statements are denied by plaintiffs' counsel, who maintain that Mrs. Jessup agreed to sell the premises and certain carpets, furniture, etc., to Mrs. Fennell for an entire consideration of \$5,350, receiving in part payment a sum of money evidenced by the following memorandum:

"Salem, Oregon, Jan. 13, 1902.

Received of Mrs. M. Fennell \$200, to bind bargain on house.
Mrs. S. Jessup."

and that the possession of the real property was delivered to the purchaser in pursuance of a parol agreement to convey the premises to her.

The testimony shows that for some time prior to January 13, 1902, Mrs. Jessup had been trying to sell her real property, for which she asked \$5,500, and that Mrs. Fennell desired to purchase it, but was unable to do so, unless she could sell a farm for which she had been demanding \$5,000. The latter was offered \$4,500 for her property, and, concluding to accept the bid, she so notified the persons making it, who gave her \$50 on account of the purchase, agreeing to pay \$2,500 March 1, 1902, and the remainder in a year therefrom. Mrs. Fennell,

having effected a sale of her farm, immediately paid Mrs. Jessup \$200, taking the receipt hereinbefore set out, and three days thereafter a contract was prepared, which contained, *inter alia*, the following clause:

"In case the said Fennell shall not be able to sell her farm on or about the 1st day of March, 1902, and make payments herein agreed, then it is understood that the said Fennell has the right to occupy the said real estate from January 15, 1902, to April 15, 1903, at \$20 per month, the amount paid on the above to be applied on the furniture purchased."

Mrs. Jessup refused to sign such writing, and so notified Mrs. Fennell, who thereafter made some changes in and improvements upon the house. It is impossible to reconcile the conflicting testimony given by the respective parties. Mrs. Fennell's daughters, who conducted the negotiations for her, each testify that the consideration agreed upon for the purchase of the land in question was \$5,350, including the carpets and furniture, and that of this sum they paid for their mother the specified \$200. Mrs. Jessup testifies that she leased the premises to Mrs. Fennell for a term of 15 months, and gave possession thereof, receiving \$200 for the carpets and furniture which she sold. The testimony further shows that Mrs. Jessup, going to a room by herself, prepared the receipt mentioned, but she says she wrote it at the request of Mrs. Fennell's daughter, who suggested the form thereof. As an excuse for incorporating into the receipt the words "to bind bargain on house," Mrs. Jessup further states that before January 13, 1902, she had never transacted any business, that her husband died about three months prior thereto, after an illness of about a year, and that his sickness and death so injured her health and affected her mind that, with her ignorance of business affairs, she wrote the receipt as requested. The use of the phrase "to bind bargain on house" might relate to a lease of that building, if the \$200 had been paid on account thereof, but these words are rendered inapplicable to such a contention by, Mrs. Jessup's testimony, which is to the effect that the sum was paid for the carpets and furniture. The wording of the receipt, therefore, corroborates the theory of the plaintiffs that the payment, which it

evidences, was made as a part of the purchase price of the premises.

1. The mental condition of a party, against whom the specific performance of an oral contract to convey land is sought, is an element to be considered in determining the circumstances attending the making of the agreement, to discredit the transaction: *Waterman*, Spec. Perf. § 159. No testimony was given tending to show to what extent Mrs. Jessup's mind was affected by the care of her husband during his last illness, or to what degree her reason was impaired in consequence of his death, except her general statements as indicated.

2. As tending to show that Mrs. Fennell's understanding in relation to the agreement entered into January 13, 1902, was for the purchase of the property, the testimony discloses that she sold her farm for \$500 less than she had been asking for it, in order to raise the money with which to purchase the property in question. It further appears that in September, 1901, she rented, for the term of one year, a new cottage, for which she purchased new carpets, and caused them to be laid on the floors, secured new shades, which she hung at the windows, procured wood for use in the winter, which she caused to be sawed, split and stored away, and that she was living in the cottage with her family when she entered into the contract alleged in the complaint. Mrs. Fennell moved into the Jessup house January 14, 1902, and, as she could use only one of her new carpets therein, she sold the others, and the window shades that she had used in the cottage for a few months, at about one-third of their original cost, and also moved the wood which she had stored for winter's use. It would appear that after January 13, 1902, when the receipt was given, Mrs. Fennell, fearing that the persons who had agreed to purchase her farm might forfeit the small payment made and fail to keep their part of the contract, sought to avoid a suit by Mrs. Jessup for specific performance by treating the agreement to purchase the property in question as a lease thereof, in case Mrs. Fennell could not raise the money, and to consider the payment of \$200, made on account of the purchase, as the consideration

for the carpets and furniture. Mrs. Winnifred O. Barr, a daughter of Mrs. Fennell, testified, however, that the writing was suggested by Mrs. Jessup, and the latter does not contradict the statement. An attorney who prepared the contract testified that he made it at Mrs. Barr's solicitation, but that the provision quoted, binding upon Mrs. Jessup, was inserted without prompting from any one. The memoranda referred to tend to corroborate Mrs. Jessup's theory, but the modification adverted to, never having been consummated, did not constitute a contract or change the terms of the agreement of January 13, 1902.

The denial of Mrs. Jessup, and the assertion of Mrs. Fennell's daughters, in respect to the agreement claimed to have been entered into, require a consideration of the circumstances attending the transaction and of the testimony, which corroborates or contradicts that of the respective parties. It seems improbable that Mrs. Fennell, when she had rented a new cottage which she had completely furnished, and which she was entitled to occupy for about nine months, should desire to move into another rented house, when, by so doing, it would entail such an expense as she incurred. So, too, it appears inexplicable that she should agree to sell her farm for \$500 less than she had been demanding for it, when she was under no obligation to do so, unless the sale was effected to enable her to purchase Mrs. Jessup's property. As a circumstance tending to show the value of Mrs. Fennell's farm, the testimony shows that in a few months after she disposed of it, without any improvement having been made thereon, one of the purchasers conveyed an undivided one-third interest therein to his cotenants for \$2,000, thus indicating that the land was worth more money than she received for it. The receipt given to evidence the payment of \$200, though not conclusive, is an admission corroborative of the testimony of plaintiffs' witnesses to the effect that Mrs. Jessup purposely signed it, as therein stated, "to bind bargain on house." Gideon Steiner, who had been engaged in business in Salem many years, appearing as plaintiffs' witness, testified that, having met Mrs. Jessup on

the street, she informed him that she had sold her property, and, in answer to his inquiry as to whether she had not received about \$5,000 for it, replied: "Yes; I got more than that." Fred Hurst, a real estate dealer, as plaintiffs' witness, testified that Mrs. Jessup listed her property with him for sale; that he found a buyer therefor who would pay \$5,000, and so notified her by telephone, whereupon she replied that she had secured a purchaser, and hung up the receiver without disclosing who it was. Mrs. Jessup, referring to the statement respecting the sale of the property imputed to her by Steiner, testified that she did not remember of having any such conversation with him, and she does not attempt to deny Hurst's statement that she informed him she had secured a purchaser for the property.

We think a careful examination of all the evidence, viewed in the light of the circumstances attending the transaction, necessarily leads to the conclusion that Mrs. Jessup, on January 13, 1902, agreed to sell to Mrs. Fennell her real property and the carpets and furniture in her house for \$5,350, receiving the sum of \$200 in part payment thereof, and that the purchaser and her family moved into the house in pursuance of the terms of such agreement, and not in accordance with any lease thereof.

3. The certainty of such a contract must be established by evidence sufficient to satisfy a court of equity of the truth of the allegations of the complaint: *Odell v. Morin*, 5 Or. 96; *Plymale v. Comstock*, 9 Or. 318.

4. If the denial of a party against whom the specific performance of an oral contract to convey real property is sought to be enforced is sufficient to defeat the right, it is quite probable that this equitable remedy would soon cease to be efficacious. It is possible that the conclusion we have reached may be doing an injustice to Mrs. Jessup, whose statements made under oath in relation to the lease of the premises may be true, and the testimony of plaintiff's witnesses in respect to the alleged sale of the land false; but courts are governed by judges who are only human, and whose deductions, based on issues of fact, depend upon evidence which they deem to be true, and, if they mistake in

their honest convictions in respect to the testimony produced, the fault lies in the method of determining the fact, rather than in the agency employed.

5. It will be remembered that all the permanent changes to the house were made by Mrs. Fennell after she knew that Mrs. Jessup had refused to sign the written memorandum. The part execution of an oral contract to convey land, which is sufficient to take the case out of the statute of frauds, must be some act done upon the premises with the actual or constructive assent of the party against whom the specific performance of the terms of the agreement is sought to be enforced: *Waterman*, Spec. Perf. § 261; *Wagonblast v. Whitney*, 12 Or. 83 (6 Pac. 399). In the case at bar there is nothing but the mere possession of the premises by Mrs. Fennell that can be regarded as having been taken with the knowledge and consent of Mrs. Jessup, and it remains to be seen whether or not that act, in connection with a payment of a part of the purchase price and a tender of the remainder, constitutes such part performance of the oral agreement as to entitle plaintiffs to the equitable relief invoked. The parties to this suit not being related by affinity or consanguinity, no presumption of a license to occupy the premises can be indulged as in cases where the owner of real property permits a person to whom he owes a legal or a moral duty to take possession thereof, in which latter instance, possession, in the absence of valuable improvements to the estate, is not a sufficient part performance: *Barrett v. Schleich*, 37 Or. 613 (62 Pac. 792); *Pugh v. Spicknall*, 43 Or. 489 (73 Pac. 1020, 74 Pac. 485). A text-writer, in speaking of the acts which amount to part performance of an oral contract to convey real property, says: "Possession alone of land, under a verbal contract, when delivered to the vendee, * * is an act of part performance which takes the case out of the statute of frauds, even without the additional circumstances of the payment of consideration or the making of improvements. This rule is settled by an overwhelming weight of authority in England and in this country, but has been disapproved by the courts of one or two states, which have, until recently, only

possessed a very limited equity jurisdiction": Pomeroy, Spec. Perf. (2 ed.), § 115. The cases cited by the learned author in the notes to this section amply support the legal principle announced.

We think the testimony shows that the parol agreement relied upon is certain and definite in its terms, that the acts proved as part performance were done under, and in pursuance of the identical contract alleged in the complaint, and that a refusal to execute the deed agreed upon would operate as a fraud upon the plaintiffs, and hence the decree should be affirmed, and it is so ordered.

AFFIRMED.

MR. JUSTICE BEAN, dissenting.

The specific performance of a parol contract for the conveyance of real estate will not be enforced under any circumstances, unless the terms of the contract are shown, by full, complete and satisfactory proof, to have been so precise that neither party could reasonably misunderstand them: *Odell v. Morin*, 5 Or. 96; *Wagonblast v. Whitney*, 12 Or. 83 (6 Pac. 399); *Knight v. Alexander*, 42 Or. 521 (71 Pac. 657). I am not satisfied that this requirement has been met by the testimony in this case.

AFFIRMED.

Decided 20 March, 1906.

ON MOTION FOR REHEARING.

MR. JUSTICE HALEY delivered the opinion of the court.

This case was argued, submitted and decision rendered while my predecessor was chief justice, and the petition for rehearing was filed after my appointment. I have carefully examined and considered the record of the case, together with the motion and argument filed for rehearing, which is based mainly upon the insufficiency of the evidence to support the decree entered, it being claimed that Mrs. Fennell and Mrs. Jessup did not enter into a contract that was clear, certain and unambiguous in its terms, for the reasons: First, the evidence does not show that Mrs. Fennell entered into any contract with Mrs. Jessup, but rather that Mrs. Fennell's daughters made the contract, if any was made, and stress is laid upon the use of the words "we" and "us" by the daughters, as referring

to themselves and not to their mother. Second, there is no sufficient evidence of authority on the part of the daughters to act as agents for their mother. It is also urged that there is no proof that Mrs. Fennell ever took possession of the property, and that there is no proof of the identity of the property in controversy.

6. Before specific performance of a contract will be decreed it must be shown by full, complete and satisfactory proof to be clear, certain and unambiguous in its terms. This is the unquestioned law to be applied to the facts in this case. The testimony of the defendant shows that she was anxious to sell her home place, the property in controversy, for she had placed it in the hands of a real estate agent for that purpose and had personally called upon Mrs. Fennell and talked with her, and at other times with her daughters, about selling it to her, the price she asked being \$5,500. She also knew that Mrs. Fennell "had been trying to sell the farm for a long time," and they talked back and forth and finally she agreed to take \$3,300, but they would not give it, and she went home and Mrs. Winkler, one of Mrs. Fennell's daughters, came over and defendant finally said:

"I will split the difference and we will call it \$5,150, but that had nothing to do with the furniture. The furniture was a different thing altogether. They said they could not buy unless they sold the farm."

Defendant further testified that she received from Mrs. Barr \$200 and gave her a receipt written by defendant acknowledging payment of that sum by Mrs. M. Fennell to bind the bargain on the house; that, on the day following the payment of the \$200, Mrs. Fennell and her family moved into the premises and took possession. In answer to a question asked her, if the contract prepared by Mrs. Barr on the 16th and which she refused to sign had been so written that it would have bound them to take the land upon the terms in it, would she have signed it, she said: "I presume I would. I do not know exactly. I presume I would"; her reason for not signing the contract being, as stated in answer to a former question:

"I thought they had all the advantages. They seemed to be

taking advantage of me, my ignorance of business, I suppose they wanted to bind me and not themselves. Not agreeing to take it unless they wanted to, I thought it was a little too one-sided."

Then, again, in answer to the question, "What was the price you were willing to take for the land?" she answered, "I agreed to take \$5,150." The testimony on the part of the plaintiffs shows that Mrs. Fennell owned a farm and was desirous of buying the property in controversy if she could sell her farm, and with that end in view she had talked with defendant and had her daughters talk with her, and on the 13th of January, 1902, Mrs. Fennell received from Mr. Goin the sum of of \$50 as part payment of the purchase price of \$4,500 for her farm, \$2,500 of which was to be paid on March 1, 1902, and the remainder one year from that date; and that, relying upon this sale of the farm, she, through her daughters, entered into the contract with the defendant to pay the defendant \$5,350 for the property in controversy, including the carpets and furniture, and upon that day did pay \$200 as a part of the purchase price, and received the receipt above mentioned, and on the following day removed from the house in which she was then living into the purchased property and there made improvements, and also sold at a loss personal property which she had in her other residence. It is also shown by the testimony of two disinterested witnesses for the plaintiffs that the defendant stated to them that she had sold her property.

That the defendant was dealing with Mrs. Fennell is shown by her own testimony, wherein she testifies to visiting Mrs. Fennell for the purpose of selling her the property, and also by the receipt she gave for the \$200, both of which facts show she did not think she was dealing with Mrs. Fennell's daughters. The use of the words "we" and "us" by these daughters evidently referred to their mother, for defendant understood they were acting for their mother, who was to furnish the means to purchase the property by selling her farm. The foregoing testimony, together with that set out in the former opinion, I think proves a contract between defendant and Mrs. Fennell which was clear, certain and unambiguous in its terms,

and such proof is full, complete and satisfactory. The contention on the part of defendant in explanation of the possession of the premises by Mrs. Fennell is that she rented her the premises for a period of 15 months, beginning January 15, 1902, but the proof of this is neither full, complete nor satisfactory, and is contradicted by the two disinterested witnesses heretofore mentioned. It is urged, however, that there is no proof that Mrs. Fennell ever took possession of the property. This contention is not well founded for the evidence shows that defendant sought to sell to Mrs. Fennell, issued a receipt for \$200 to her, and looked to her as the responsible party and principal who was to furnish the money, and these facts, coupled with her subsequent entry thereon, are sufficient proof of her taking possession.

The only remaining question, then, is that of the identity of the property in controversy. This suit is brought by plaintiffs for the specific performance of a contract to convey certain real property described in the complaint, and to restrain defendant from prosecuting an action of ejectment against plaintiffs to recover possession of the same premises. The complaint describes the premises and, after setting forth the commencement of the ejectment action by defendant as plaintiff against plaintiffs as defendants to recover possession of the premises described, alleges a contract whereby defendant sold and agreed to convey "said real premises" to one Margaret Fennell, whose heirs are among the plaintiffs. The answer admits the commencement of the ejectment action, "to recover possession of the same lands and premises in question in this suit;" and that defendant "was on the 15th day of January, 1902, and for a long time prior thereto had been the owner in fee simple and in possession of the lands and premises described in the complaint herein." Since there is only one piece of property described in the complaint and defendant admits that her action in ejectment was for the purpose of recovering the possession "of the same lands and premises in question in this suit," I think there can be no question about the identity of the property in controversy, as it is admitted by the answer, and it is

unnecessary for any of the witnesses to describe it with particularity. The only property in controversy between the parties was that described in the complaint, the correct description of which is admitted by the answer, and referred to as the same lands and premises in question in this suit.

I therefore concur in the opinion of Mr. Justice MOORE, heretofore written herein, and the motion for rehearing is denied.

AFFIRMED. REHEARING DENIED.

Argued 4 April, decided 12 June, 1906.

PIERSON v. FISHER.

85 Pac. 621.

APPEAL—PRESUMPTION THAT EVIDENCE WAS PROPERLY ADMITTED.

1. Where testimony that is inadmissible under the pleadings has been received without objection, it will be presumed on appeal that the cause was tried as though there had been an issue on the subject to which the evidence related.

CANCELLATION OF INSTRUMENT—RETURN OF CONSIDERATION—FRAUD.

2. It is always necessary, as a condition precedent to the cancellation of an instrument or the rescission of a contract, to return or offer to return the consideration received, so that the parties may be placed in their original positions; unless the contract was accomplished by force or fraud, in which cases no return or offer of the consideration is necessary.

DEEDS—PRESUMPTION OF DELIVERY—BURDEN OF PROOF.

3. The possession of an executed deed by the grantee named therein creates a presumption of its regular delivery, and one asserting the contrary has the burden of proving such claim.

DEEDS—ACTS AMOUNTING TO DELIVERY.

4. Delivery of a deed is accomplished when the grantor voluntarily passes it to the grantee, or some one for him, or when the grantor does or says something that discloses unmistakably an intent to finally part with all control over the instrument.

From Yamhill: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE MOORE.

This suit was instituted January 12, 1905, by Mary E. Burbank against Charles F. Fisher, to remove a cloud from the title to real property. The complaint alleges in effect that plaintiff's mental faculties, by reason of advanced age, were impaired: that the defendant having knowledge thereof and with intent to defraud her, falsely represented that the stock of the American Alarm Co., a corporation, was of the par value of \$50 a share; that he had found a person who would pur-

chase her farm in Yamhill County and pay therefor the sum of \$8,850, if she would accept \$4,000 in cash and stock of that corporation of the face value of \$4,850; that such representations were false, and so known to be by the defendant and such stock was worthless; that plaintiff having no knowledge of the value thereof, or of the falsity of such statements but firmly believing them, verbally agreed that in consideration of the payment of that sum and of the delivery of such stock she would convey her farm to such person as the defendant might designate; that pursuant to the terms of such agreement, she signed, sealed, caused to be witnessed and acknowledged a deed, purporting to convey to the defendant the legal title to the farm, but she did not deliver the instrument, leaving it on a table intending to retain possession of it until the consideration specified had been paid and delivered to her; that without her knowledge or consent, the defendant took such instrument and carried it away and unless restrained, will cause it to be recorded, thereby further clouding the title to the premises, to prevent which she has no plain, speedy or adequate remedy at law. The prayer for relief is for an injunction to prevent the deed from being recorded, for the removal of such cloud and to require the defendant to surrender the deed that it may be destroyed.

The answer denied the material allegations of the complaint and averred that January 2, 1905, the defendant entered into a contract with the plaintiff by the terms of which it was stipulated that in consideration of the delivery to her of the stock of such corporation, of the par value of \$7,500, and \$1,000 in cash, she would convey her farm to him or to such purchaser thereof as he might secure; that five days thereafter this contract was modified so that she accepted the defendant's promissory note for \$1,000, payable in one year with 8 per cent interest, in lieu of that sum in cash, and executed and delivered to him her deed of the premises, receiving such stock and note, except that by agreement he retained the sum of \$50 for procuring an abstract of the title to the land; that at the time the deed was executed the stock referred to was of the reasonable

value of \$50 a share, which fact plaintiff then well knew; that at such time the defendant was and now is solvent and is ready, able and willing to pay the sum so expressed and interest, and tenders the amount thereof to her; that the note and stock were delivered to plaintiff January 7, 1905, the control of which she now has and defendant holds possession of the deed and is the owner of the land. The reply put in issue the allegations of new matters in the answer and the cause having been tried, it was decreed that the defendant had no interest in the land or any part thereof, and the temporary injunction which had been issued was made perpetual, whereby he was restrained from recording the deed and from incumbering or conveying any part of the premises, and he appeals. After the appeal was perfected the plaintiff died testate, whereupon Clark M. Pier-son, the executor of her last will and testament, and her de-vicee, the State of Oregon as trustee, were substituted as re-spondents.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Thomas O'Day*.

For respondents there was a brief over the names of *McCain & Vinton, F. W. Fenton* and *G. G. Bingham*, with an oral argument by *Mr. James McCain*.

MR. JUSTICE MOORE delivered the opinion of the court.

The evidence shows that a patent was issued February 3, 1903, to Ira S. Bunkard for a fire and burglar alarm. This device, as appears from blue prints offered in evidence, consists of clock machinery which is set in motion by the severing of a cord by fire or by the raising of a window or the opening of a door, causing a bell to ring and disclosing on an indicator the location of the disturbance and the probable cause of the alarm. The American Alarm Co. was incorporated, under the laws of this state, with a capital stock of \$50,000, divided into 1,000 shares of \$50 each. Bunkard, in consideration of \$600, assigned all his interest in this patent to the incorporators of that company who transferred such right to the corporation for its entire capital stock, on the assumption that it had been

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fully paid up. The company delivered to the incorporators, who paid for an assignment of the patent, \$30,000 of its stock, and the remainder of the issue, which is designated as "treasury stock," was held in trust for the corporation, to enable it by the sale thereof to secure money to be used in perfecting the invention and in manufacturing and selling the apparatus. About one-half of the treasury stock has been disposed of, a small part of which was given to persons whose influence was considered advantageous to the company, and the remainder sold at par. The corporation, January 7, 1905, possessed in cash about \$325; manufactured alarms costing about \$1,800; patterns of the value of \$1,800; and office furniture worth about \$75, making the value of its tangible property about \$4,000. The company in a year and a half prior thereto, or during the period of its existence, had disposed of the right to manufacture and sell its alarms in one county only and had sold only six fire and burglar alarms to persons who were not the owners of its capital stock. These meager sales were accounted for by the delay necessitated in developing the machinery and in perfecting its operation, and also by difficulty experienced by the agents of the company in finding a factory where the alarms could be manufactured at reasonable prices, which obstacles, so it is claimed by defendant's witnesses, had been overcome only a few days prior to January 7, 1905. The company issued circulars which, for a prelude, contained the following couplet:

"Dollars and dimes, dollars and dimes,
An empty pocket is the worst of crimes."

The prospectus showed how much money had been made by investing a single dollar in various enterprises and what sales of alarms could be expected, asserting that from the purchase of one share of alarm stock at \$50, the sum of \$1,500 might be realized.

The plaintiff, Mrs. Burbank, became acquainted with the defendant soon after the corporation was organized, when he called upon her with a view of selling its capital stock and at that time she received one of these circulars. In May, 1904,

he visited her again and gave her one share of such stock, whereupon she purchased of him five more shares of the stock for which she paid \$250. At that time Mrs. Burbank was 77 years old, and until the death of her husband, which occurred about four years prior thereto, she had never transacted any business of importance, though possessed of considerable property. The defendant, having only thrice met the plaintiff, wrote her as follows:

"AMERICAN ALARM COMPANY.

Portland, Ore., Nov. 14th, 1904.

Mrs. Mary E. Burbank,
Lafayette, Oregon.

Dear Mrs. Burbank.

I have recently bought a home here in Portland and am happily located, and Mrs. Fisher and myself wish to extend to you a special invitation to come and spend Thanksgiving week with us. We have both lost our parents, and we dearly love elderly people, and feel we would be glad to do all in our power to make you happy and enjoy your visit with us. You have not as yet met my wife, but I have so often spoken of you that she already feels she is acquainted with you.

Hoping that you are well and that you will be able to come,

I am, respectfully,

C. E. Fisher,
670 Tillamook St."

Mrs. Burbank, as a witness in her own behalf, testified that the defendant visited her in January, 1905, telling her he had found a purchaser from California who would take her land and make a nut farm of it; that she told him the premises contained 190 acres which she would sell for \$45 an acre and take \$4,000 in cash and a mortgage on the land to secure the remainder of the purchase price; that after discussing the proposed sale a short time, he suggested the acceptance of Alarm stock instead of cash, to which proposition she did not accede, telling him she wanted it distinctly understood that she must have cash when she sold her farm; that he thereafter returned with a deed which had been prepared and asked how much money was required to be paid down and she informed him that she must have \$4,000; that after doing some writing, he said: "Here, Mrs. Burbank, is where you sign your name to

the deed," and she subscribed her name to the instrument, which was witnessed and acknowledged and left on a table; that going into another room and returning in a few minutes she was unable to find the deed; that she was then called to dinner, whereupon he left, saying there were the certificates of stock and a promissory note, but she did not take them. On cross-examination, she said that prior to signing the deed she never entered into any agreement with the defendant to sell her farm; that she never consented to take Alarm stock as a part of the consideration therefor, though she told him if a sale of the premises was effected she might buy some of the stock from him; that she did not see him take the deed, but immediately after he left the house she found it was gone; that she signed the deed thinking the defendant had issued a check to her for \$4,000, and that the remainder of the consideration would be secured by a mortgage on the premises, though nothing was said about giving security; that she did not give him a lease from which to obtain a description of the farm and if he secured the evidence of a demise of the premises, it was when he was examining her papers; and that the deed which she signed was not read by or to her.

P. P. Olds, a notary public, testified that at defendant's request he went to the home of Mrs. Burbank, to take her acknowledgment to a deed; that the defendant having preceded him was at her house when he reached it; that about 10 or 15 minutes after his arrival the defendant took a deed from his pocket, to which she subscribed her name, and, it having been witnessed, he thereupon appended his certificate, after taking her acknowledgment, leaving the deed on a table; that Mrs. Burbank, having signed the instrument, took a seat at the right of and about 10 feet from the witness, who occupied a chair between her and the defendant; that after the deed had remained on the table about five minutes, the defendant took it, and put it in his pocket without paying her any money as a consideration for the conveyance; that when the deed was so taken he did not observe Mrs. Burbank and could not say whether or not she saw the defendant get the instrument; that

at that time there was no other person present; that just prior to picking up the deed the defendant was talking about some Equitable stock which the witness was thinking of taking; and that about January 20, 1905, the defendant called upon him, saying that the reason he did not tell him anything about Mrs. Burbank's deed was because she was capable of conducting her own business, and did not care to have her transactions known. Charles Bynum testified that January 7, 1905, he was employed in a livery stable at McMinnville, from which city he rode in a buggy with the defendant to Lafayette, where Mrs. Burbank then lived; that the defendant returned with him part of the way and on the road remarked to him that he had purchased a farm for \$8,000 from her for some person in California who expected to raise walnuts on the land.

The defendant, as a witness in his own behalf, testified that Mrs. Burbank requested him to find a purchaser, if possible, for her farm, saying she expected to leave her property to some charitable institution, and was anxious to settle her business affairs, so as to secure a permanent income; that January 2, 1905, she agreed to sell the farm for \$8,500 and accept therefor Alarm stock of the face value of \$7,500, and the remainder in cash; that she looked over her papers to find the deed of the premises, but being unable to discover it she asked him to assist her in the search, and doing so, he found a lease of the farm from which she said a description of the premises could be obtained; that he took the lease, promising to return in a few days with a deed of the premises prepared for execution; that five days thereafter he again visited Mrs. Burbank, telling her that he had been disappointed in a business venture whereby he expected to secure the sum of \$1,000 with which to pay the cash part of the consideration for the land; that in lieu of such payment she agreed to accept his promissory note for that sum payable in a year with interest, which he executed and also assigned to her Alarm stock of the face value of \$7,500 and delivered the same to Mrs. Burbank, who placed such writings in an envelope; that when the deed was executed he put it in his pocket and thinks she saw him doing so; that he thereafter

exhibited the deed to her, after the notary public left the house, saying that if the abstract, which he had ordered, should show that the instrument was insufficient, for any reason, to convey the legal title to the premises intended, she would be expected to execute a quitclaim deed to correct the matter, to which she replied, "Certainly;" that there never was any agreement whereby she was to receive the sum of \$4,000 in cash; that the contract to assign to her Alarm stock of the face value of \$7,500 was the only agreement ever entered into January 2, 1905, and which was thereafter modified only in respect to giving a promissory note for the sum of \$1,000 in lieu of the cash. The defendant admits that he told Bynum that he had purchased Mrs. Burbank's farm, for an equivalent of \$8,000 in cash and would receive a commission of 5 per cent on account thereof, but that he did not remember saying that he had a partner in the transaction. He also admits that the first time Mrs. Burbank spoke to him about desiring to sell her farm she stated that she would take \$8,500 for it and accept \$4,000 thereof in cash and the remainder on time, saying: "That conversation occurred several times."

Mrs. Burbank, on rebuttal, testified that she never saw the deed after she signed it and left it on the table; and that the defendant did not thereafter take the instrument from his pocket or ask her to make a quitclaim deed. It further appears that when the deed was signed, Mrs. Burbank was 77 years old and her physician, Dr. E. E. Groucher, who had known her about 25 years, testifying as to her condition at that time, said that she had been sick and was feeble. Mrs. Mamie Cone, who, with her husband, was keeping house for the plaintiff, January 7, 1905, testified that at that time Mrs. Burbank was not at all well. Mrs. Burbank did not tender to the defendant the note which he drew in her favor or the certificates of stock which he had assigned to her, nor were they deposited in court for him. She wrote him, however, January 12, 1905, when this suit was instituted, to call at her home and take them away and to return to her the deed which he had taken.

1. It is contended by defendant's counsel that, the complaint

having alleged that the remainder of the purchase price of the land, in excess of \$4,000 in cash, was to have been paid by the delivery of shares of stock of the American Alarm Co., the plaintiff was bound by such averment and therefore estopped to deny it, which, as a witness, she did by testifying that no agreement had ever been entered into with the defendant whereby any part of the consideration was to be paid in stock. The testimony referred to was brought out on cross-examination by defendant's counsel, who did not move to strike it out as immaterial, or object to it in any manner. Nor was any motion made by plaintiff's counsel to amend the complaint so as to make it conform to the testimony given. In this condition of the record, it must be assumed, after decree, that the cause was tried as though the issue was regularly made, which being germane to the cause, it is now too late to invoke the legal principle insisted upon.

2. It is maintained by defendant's counsel that the complaint stated that the deed was obtained by fraudulent representations and without consideration, and, as the prayer for relief is that the sealed instrument be surrendered so that it may be destroyed, the suit is for the cancellation of a deed, but as plaintiff retained the stock and promissory note, she was not entitled to any equitable alleviation until they were returned or tendered to the defendant, and hence an error was committed in rendering the decree complained of. In all cases of rescission the parties who would be affected thereby must be placed *in statu quo* as an incident to the abrogation of their agreement, which necessitates a return or tender by the injured party of all property, rights or franchises that may have been received as the consideration for an executed contract, before a court is authorized to grant the relief asked, on the theory that he who seeks equity must do equity. Rescission always implies that a contract has been duly executed, the binding force of which is attempted to be avoided by one of the parties in consequence of some act of the other. If a party were compelled by force or fear to exchange any of his property for that of another, he would not be required to return or tender that which

had been imposed upon him as a condition precedent to securing his own, because there had never been a meeting of their minds whereby a consent to the interchange was given. The delivery of a deed of real property is the last act of a grantor that serves to transfer his title to the premises and evidences the *aggregatio mentium* of the parties respecting the entire subject-matter of the contract. Until such delivery has been made by the grantor or by some person authorized to surrender possession of the deed for him, the contract to convey real property has never been executed, and in such case, if the grantee surreptitiously, or without the consent of the grantor, obtains the sealed instrument, no title passes. If Mrs. Burbank's deed was not delivered, the certificates and the note which were left in her house by the defendant would not impose on her the duty to return or tender them, unless she consented to accept them as the consideration for the conveyance.

An examination of the averments of the complaint and of the prayer for relief might seem to support the contention of the defendant's counsel that this suit was instituted to cancel a deed, but when the pleading is construed according to the liberal rules which the statute prescribes (B. & C. Comp. § 85), we think the allegations referred to were inserted as matters of inducement to illustrate the situation of the respective parties and that the part of the prayer mentioned should be regarded as the court treated it, as an inadvertence. This being so, if the defendant attempted to impose on Mrs. Burbank by taking the deed without her knowledge or consent and leaving the stock and note, she was not obliged to return or tender them to him, nor even write him, as she did, to take them away from her house, for if he chose to leave his property under the circumstances supposed, his voluntary act was tantamount to an abandonment, for which he alone is responsible.

3. The executed deed having been found in the possession of the defendant, who is the grantee named therein, a presumption arises that the sealed instrument was regularly delivered, and the burden of overcoming this disputable presumption, which results from such fact, is imposed on the person alleging to the

contrary: *Flint v. Phipps*, 16 Or. 437 (19 Pac. 543); *Tyler v. Cate*, 29 Or. 515 (45 Pac. 800); *Swank v. Swank*, 37 Or. 439 (61 Pac. 846).

4. The delivery of a deed is accomplished by the grantor's voluntarily passing it to the grantee or handing it to some person for him, or by the grantor's doing or saying something by means of which he discloses an unmistakable purpose to part with all control over the instrument and thus forever to put it out of his power to regain possession thereof: *Fain v. Smith*, 14 Or. 82 (12 Pac. 365, 58 Am. Rep. 281); *Allen v. Ayer*, 26 Or. 589 (39 Pac. 1); *Hoffmire v. Martin*, 29 Or. 240 (45 Pac. 754).

The testimony fails to show that Mrs. Burbank handed the deed to the defendant or to the notary public for him, or that she said or did anything that could possibly be construed as an intent irrevocably to surrender the possession of the instrument. The defendant testified that in the presence of Mr. Olds, the notary public, he took the deed, just after Mrs. Burbank signed it, and in answer to the inquiry, "Did she see you take the deed?" he replied, "I think she did. She was sitting facing me." It will thus be seen that the testimony of the defendant overthrows the presumption which the law raises from his possession of the deed. It will be remembered, however, that he testified that after taking the deed and putting it in his pocket, he exhibited it to Mrs. Burbank, who said that if the description of the premises should prove incorrect she would execute a quitclaim deed to rectify the mistake. This is the entire testimony of the defendant on the question of delivery. Mrs. Burbank testified that she did not see the defendant take the deed, and that he never exhibited it to her or asked her to make a quitclaim deed. This dispute leaves for consideration the question of the probable preponderance of testimony as between the plaintiff and the defendant. The method pursued by the defendant to gain the confidence of Mrs. Burbank, whom he had met only two or three times in a business matter, by soliciting her to visit and spend a week with his wife, who had not even seen her, and justifying his invitation on the plea of the love

of orphans for, and their desire to promote the happiness of, aged people, would seem to show a personal interest in Mrs. Burbank's welfare not disclosed by his letter, when it is remembered that she possessed considerable means.

The circular issued by the American Alarm Co., showing what vast sums of money might be realized by purchasing its capital stock, was well calculated to excite the interest of an aged and feeble woman, who desired to place her property so it would best subserve the maintenance and education of orphans, thereby inducing her to agree to accept such stock, in excess of \$4,000, as equaled the estimate she placed upon her farm. It is not intended to say anything disparaging about the stock of the corporation, for the patent owned by it is undoubtedly valuable, thus making its assets greater than would appear from the value of its tangible property. The alarm manufactured by the company is useful and as it is retailed at a moderate price, the sales thereof ought to be extensive, but whether or not the expectations of the incorporators respecting such sales as indicated in their prospectus, will ever be realized is problematical. It is probably true that what is said in the circular of the company as to the value of its stock is only a matter of the consensus of opinion of the incorporators, the roseate hues of which reflect their ardent desires and upon which purchasers of stock ought not to rely. Mrs. Burbank, however, by reason of her inexperience in business and her extreme age and infirmity was unable to resist the allurements of the company's prospectus which she had received, or wholly disregard the blandishments of the defendant, who told her she was a person of such wealth that her influence was a sufficient consideration for the assignment to her of one share of stock.

Not any one particular act of the defendant hereinbefore adverted to is sufficient, perhaps, to overcome his declarations under oath, respecting the delivery of the deed, but when all are considered and his conduct towards Mrs. Burbank is viewed in the light of his interest, we believe her testimony on the particular subject involved preponderates, and, this being so, the decree is affirmed.

AFFIRMED.

Decided 17 July, 1906.

BARTON v. ROSE.

85 Pac. 1009.

SUFFICIENCY OF NOTICE OF MECHANIC'S LIEN.

Under Section 5644, B. & C. Comp., a notice of mechanic's lien must show on its face that the claimant either furnished material or performed labor which was used in the building under construction.

For instance: A claim reciting that "T. has by virtue of a contract with R. in the erection, material furnished and labor of a certain dwelling house," etc., is ineffectual for any purpose because there is no verb showing that anything was done.

From Malheur: GEORGE E. DAVIS, Judge.

Suit to enforce an alleged mechanic's lien by T. A. Barton against W. W. Rose and wife, resulting in a decree for defendants. Hence this appeal. AFFIRMED.

For appellant there was a brief and an oral argument by Mr. *George Wesley Hayes*.

For respondents there was a brief over the name of *McCulloch & Callahan*, with an oral argument by Mr. *J. A. Callahan*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to foreclose a mechanic's lien. The portion of the claim of lien material on this appeal is as follows:

"Know all men by these presents, that T. A. Barton, of Vale, in the County of Malheur, has by virtue of a contract heretofore made with W. W. Rose, of the County of Malheur, in the erection, material furnished and labor of a certain dwelling house, the ground upon which said dwelling house was built and erected being at the time the property of Mattie Rose, wife of W. W. Rose, who caused the said dwelling house to be erected and built, said dwelling house and land being known and particularly described as follows."

This notice is insufficient within the rule announced in *Rankin v. Malarkey*, 23 Or. 593 (32 Pac. 620, 34 Pac. 816); and *Dillon v. Hart*, 25 Or. 49 (34 Pac. 817). It does not state, either directly or by necessary inference, to whom the plaintiff furnished the material or labor for which he seeks a lien, or, indeed, that he furnished any labor or material used in the building sought to be impressed with the lien. It is essential to the validity of a mechanic's lien under our statute (B. & C.

Comp. § 5644) that the claim as filed contain a statement of the name of the person to whom the claimant furnished the materials or for whom he performed labor, and, however liberal the court may be in the construction of the mechanic's lien law, it cannot change the language used in the lien claim by eliminating or substituting words or supplying omissions therein. The decree is affirmed. AFFIRMED.

Decided 24 July, 1906.

STATE ex rel. v. FROST.

86 Pac. 177.

QUESTION FIRST RAISED ON APPEAL.

Subject to certain statutory exceptions, questions not presented to and ruled upon by the trial court cannot be considered by the supreme court.

For instance: A referee having returned a part of the testimony in a case, the action of the parties in submitting the cause without any proceeding to secure the balance of the testimony precludes the supreme court from considering the conduct of the referee.

From Grant: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a contempt proceeding, instituted by the State, upon the relation of Bascom Glaze, against Herman Frost, for a violation by the latter of a decree of this court rendered in December, 1903, in which it was adjudged and decreed that the relator was entitled to a prior right, as against the defendant, to 50 inches of the waters of Squaw Creek, in Wheeler County, to be measured under a four-inch pressure at the head of his ditch, and enjoining and restraining defendant from in any manner interfering with or preventing such quantity of water from flowing in the natural channel of the stream to the head of the relator's ditch. The relator was required by the decree to "maintain a tight dam below the head of his ditch of sufficient height to raise the water in his ditch to the required head" before he is entitled to the quantity of water awarded. This decree was regularly entered in the court below, and on October 22, 1904, the relator filed an affidavit in that court, alleging that he had complied with the decree on his part and charging that the defendant violated the same on the 26th,

27th and 29th of June, and the 8th of August, 1904, and at divers other times, by constructing dams and obstructions in the creek above the head of relator's ditch and thereby diverting the waters from their natural channel to such an extent that during the dates mentioned the relator only received from 15 to 20 inches at the head of his ditch. The defendant was required to appear and show cause why he should not be punished for contempt. He answered, denying that he had violated the decree referred to, and affirmatively alleged that the relator had not complied with such decree by maintaining a tight dam at the head of his ditch, but had carelessly and negligently used the waters of the stream and permitted such waters to flow down to his brother, who owned land on the stream below.

By consent of the parties the cause was referred to a referee to take the testimony and transmit it to the judge of the court for his consideration. After the testimony for the relator had been taken and two witnesses for the defendant examined, the referee was advised that the county would not pay or allow any referee or reporter's fees in the case, and thereupon he demanded that the parties pay or secure to be paid his fees for taking and reporting the testimony. The relator complied with this request and paid the fees for all testimony taken on behalf of the plaintiff, but the defendant declined to pay or secure to be paid the fees for taking his testimony, whereupon the referee refused to proceed further and reported the testimony already taken, together with a statement of the facts, to the court for its consideration. Upon the case coming on to be heard no objection was interposed because the testimony had not all been taken, and no motion was made for an order requiring the referee to proceed with the testimony or application made to take additional testimony; but the cause was submitted for decision upon the record as made. The court found the defendant guilty, and fined him \$50 and costs, from which judgment he appeals.

AFFIRMED.

For appellant there was a brief over the name of *Errett Hicks*, with an oral argument by *Mr. John Langdon Rand*.

For the State there was a brief and an oral argument by *Mr. Victor G. Cozad*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The error, if any, of the referee in refusing to proceed with the taking of the testimony until his fees were paid or secured to be paid, was waived, because not urged in the court below. If the defendant desired further to pursue that matter, he should have adopted some proper proceeding for that purpose in the trial court, and thus given that court an opportunity to pass upon the question, and if the ruling was not satisfactory he could have brought the matter here for review. But, without some decision or request for a decision by the trial court, there is nothing for us to consider.

Upon the facts two questions arise: First, whether the relator complied with the decree by maintaining a tight dam below the head of his ditch, so as to prevent the water from flowing on down the stream; and, second, whether the defendant interfered with the flow of the water, so as to prevent the required quantity from coming down to the head of the relator's ditch. These questions may properly be considered together.

J. M. Franklin testified that he assisted in the construction of a dam across the stream just below the head of the relator's ditch in June, 1904, and that such dam was absolutely tight; that after the dam was constructed there was no water in the stream for some distance below, except seepage water; that the dam was maintained by the relator during the irrigating season, except on the occasion of a cloudburst, when it was washed out, but was immediately replaced; that he (witness) was at the head of relator's ditch six or eight times between the 27th of June and the 9th of August, and assisted in measuring the water in the stream at that place on the 27th of June and on the 9th of August, and there was only from 13 to 20 inches therein; that on the dates he measured the water he visited the defendant's ditches above that of the relator, and found them "about as full of water as they could hold," and "had twice the amount of water that was in Mr. Glaze's ditch"; that during one of his visits he saw defendant putting a dam across the creek at the

head of his ditch, so as to divert the water from the stream into his ditch. P. J. Morrison testified that he was present when the water was measured at the head of the relator's ditch on June 29th and on August 8, 1904, and there was only 15 inches on the first and 14 inches on the latter occasion; that there was no water below the dam for 300 or 400 yards where there was a small quantity on the bed rock, but not sufficient to form a continuous flow; that on the 29th of June the defendant's ditch was running full and carrying more water than relator's. Finlay Morrison and the relator testified to practically the same state of facts as the other witnesses, but it is unnecessary to refer to their testimony in detail. This evidence is uncontradicted, and shows clearly a substantial compliance by the relator with the decree of the court by constructing and maintaining a sufficient dam below the head of his ditch, and that the defendant diverted the water to the injury of the plaintiff and in violation of the decree and restraining order. The judgment of the court below will therefore be affirmed.

AFFIRMED.

Decided 9 January, rehearing denied 20 March, 1906.

GOODNOUGH MERCANTILE CO. v. GALLOWAY.

84 Pac. 1049.

BANKRUPTCY—RIGHT OF TRUSTEE TO POSSESSION OF ATTACHED PROPERTY.

1. Under the national bankruptcy law of 1898 (30 Stat. U. S. c. 541, § 70, subds. "a" and "e"), a trustee at once upon qualifying becomes by operation of law vested with the legal title to all the unexempt property of the bankrupt, and from that date is presumably in possession thereof unless the contrary affirmatively appears, notwithstanding such property may have been already seized upon legal process from some other court.

JURISDICTION OF STATE COURT OVER SUIT AGAINST TRUSTEE.

2. After a trustee in bankruptcy has qualified no suit can be commenced against him without his consent in any state court to enforce a lien upon personal property belonging to the bankrupt's estate.

EFFECT OF APPEARANCE ON JURISDICTION OVER SUBJECT-MATTER.*

3. Though one may voluntarily submit to the jurisdiction of a court that could not compel his appearance, he cannot by any act confer on such court jurisdiction over subject-matter since that can be conferred only by law.

*NOTE.—See, to the same effect, *Wong Sing v. Independence*, 47 Or. 231, 233.
REPORTER.

For instance: Where a state court has not jurisdiction over the subject-matter of a suit against a trustee in bankruptcy appointed by a federal court, the appearance of such trustee in response to a summons, and his action in defending the case, cannot confer jurisdiction over the subject-matter, even though the answer prays for affirmative relief.

WAIVER BY PLEADING OVER AFTER DEMURRER.

4. Error in overruling a demurrer for want of jurisdiction over the subject-matter of the suit is not waived by answering over.

HEARSAY EVIDENCE.

5. The statement by a public official that he did not perform a certain act, but that the records of his office show such act to have been performed, is hearsay.

EFFECT OF ORDER OF BANKRUPTCY ON PRIOR ATTACHMENTS.

6. Under Section 67, subd. "f" of the national bankruptcy act of 1898, relating to attachments against the property of insolvents prior to an adjudication of bankruptcy, an attachment levied on such property within four months prior to the filing of a petition in bankruptcy is discharged by the order of adjudication, unless there is an order preserving such lien.

JURISDICTION OF STATE COURTS OVER SUITS AGAINST TRUSTEES AFTER AN ADJUDICATION OF BANKRUPTCY.

7. Under Section 21, subd. "e" of the national bankruptcy act of 1898, the title to the unexempt property of the bankrupt becomes vested in the trustee at once upon the approval of his bond, effective by relation as of the date when the adjudication of bankruptcy was made, and thereafter no suit can be commenced by any one in any other court to enforce any lien upon any personal property of the bankrupt, regardless of where the physical possession thereof may be when such suit is commenced, but the claim must be presented to and adjudicated by the bankruptcy court, since it first obtained jurisdiction over the property.

BANKRUPTCY—HOW OBJECTION TO JURISDICTION OF STATE COURT MAY BE WAIVED BY TRUSTEE.

8. A trustee in bankruptcy is considered to have waived the objection that a court in which he has been sued has not jurisdiction over the subject-matter of litigation only when he answers to the merits without having suggested the want of jurisdiction.

For instance: When a trustee has been sued in a state court for part of the bankrupt's property, and has demurred to the jurisdiction over the subject-matter of the suit, and upon the objection being overruled, has answered to the merits, it cannot be said that he has waived the objection to the jurisdiction of the court over the subject-matter.

From Union: ROBERT EAKIN, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by the Goodnough Mercantile & Stock Co. against G. W. Buck, Cecil Galloway, the trustee in bankruptcy of his estate, and the First Bank of Elgin, to foreclose an equitable lien on personal property. It appears that on September 1, 1902, the defendant G. W. Buck was the owner of a sawmill, and, having secured the timber on certain premises

belonging to others, it is alleged he verbally agreed to give to the plaintiff, a private corporation, a lien upon such timber and upon the logs and lumber cut and manufactured therefrom as security for money and supplies to be furnished by it to enable him to operate his mill. He also entered into a contract with the Elgin Lumber Co. January 23, 1903, for the sale of the lumber which he might manufacture that year, the prices agreed upon therefor to be paid monthly as the lumber was delivered. He executed to plaintiff, January 31, 1903, and February 28th of that year, written instruments purporting to sell to it 332,100 feet and 145,600 feet of logs, respectively, at \$2.50 per thousand, each memorandum stating that it was given as collateral security; but these instruments were not acknowledged or certified, so as to be entitled to record. An accounting was had between plaintiff and Buck April 16, 1903, and there was found to be due to it \$3,850, for which sum he executed his promissory note payable on demand, and at the same time gave it a written order on the Elgin Lumber Co. to pay plaintiff all money due on the sale of lumber, which order was accepted, though no lumber had been delivered. Buck assigned to plaintiff, May 2, 1903, all his interest in the timber which he had secured. The defendant the First Bank of Elgin, a corporation, commenced an action against Buck in the Circuit Court of the State of Oregon for Union County, May 7, 1903, to recover the sum of \$2,084.03, and, having sued out a writ of attachment, the sheriff of that county, in pursuance thereof, seized all the logs and lumber owned by Buck, and also took possession of his mill under the terms of a chattel mortgage thereon.

The creditors of Buck having filed a petition in the United States District Court for the District of Oregon, such proceedings were had therein that he was adjudged a bankrupt, and the defendant Cecil Galloway was appointed and duly qualified as trustee of the bankrupt's estate. The plaintiff herein presented to the referee in bankruptcy its verified claim, evidenced by the promissory note, and an account for money and supplies furnished to Buck after the execution of such note, asserting that it held a lien on the timber, logs and lumber as security therefor, (48th Or.—16)

and stating that it was entitled to the immediate possession of such property to dispose of it in payment of its demand. This suit was thereafter instituted in the Circuit Court of the State of Oregon for Union County, the complaint stating the facts as hereinbefore detailed in respect to the right of an equitable lien upon such property, and averring that Galloway, as trustee, was claiming the right to take possession of the property to sell it, and, unless restrained, he would do so, thereby depriving plaintiff of its lien. An injunction was thereupon issued out of the state court restraining the trustee in bankruptcy from disposing of the property. The defendants Galloway and the First Bank of Elgin separately demurred to the complaint, on the ground, *inter alia*, that the court did not have jurisdiction of the subject-matter of the suit; but, the demurrers having been overruled, these defendants separately answered, denying the material allegations of the complaint, and averring that such bank by its attachment secured a lien upon the logs and lumber so seized, which they severally prayed might be decreed to be prior to all other incumbrances. The allegations of new matter in the answers having been put in issue by the replies, the cause was referred, and from the testimony taken the court made findings of fact and of law, establishing plaintiff's equitable lien, and decreeing a foreclosure thereof for the sum due from Buck; and Galloway and the First Bank of Elgin appeal.

REVERSED.

For appellants there was a brief with oral arguments by *Mr. Francis Swift Ivanhoe* and *Mr. James Davis Slater*.

For respondent there was a brief over the name of *Ramsey & Oliver*, with an oral argument by *Mr. William Marion Ramsey*.

MR. JUSTICE MOORE delivered the opinion of the court.

The question presented by this appeal is whether or not, after an adjudication of bankruptcy, a suit can be maintained in a state court by a third person against a trustee in bankruptcy to foreclose a lien upon personal property belonging to the bankrupt's estate. The pleadings do not state who was in possession

of the logs and lumber in question when this suit was instituted. The testimony shows, however, that Buck had possession of such property until it was seized in pursuance of the writ of attachment issued in the action of the First Bank of Elgin against him, when the sheriff of Union County secured the possession thereof.

1. A trustee in bankruptcy upon his appointment and qualification becomes vested by operation of law with the title to all unexempt property of the bankrupt, and is authorized to avoid any transfers by the latter of his property which a creditor of such bankrupt might have set aside, and he may recover the property so transferred, or its value, from the person to whom it was assigned, unless such person was a bona fide holder for value prior to the date of the adjudication of bankruptcy: Act July 1, 1898, 30 Stat. U. S. 544, 565, 566, c. 541, § 70, subds. "a," "e" (U. S. Comp. St. 1901, pp. 3451, 3452, 1 Fed. Stat. Ann. 525, 697, 702). The filing of a petition in bankruptcy is in effect a notice that the unexempt property of the person named therein as having committed an act of bankruptcy may be seized and the proceeds arising from the sale thereof applied in payment of his debts, and such petition is also a warning to all persons not to meddle with such property, the title to which, upon an adjudication in bankruptcy, vests in the trustee when qualified, whereby he secures the actual or acquires the constructive possession, thereby bringing the property applicable to the payment of debts into the jurisdiction of the bankruptcy court: *Mueller v. Nugent*, 184 U. S. 1 (22 Sup. Ct. 269, 46 L. Ed. 405); *Moore Mfg. Co. v. Billings*, 46 Or. 401 (80 Pac. 422). Though the sheriff of Union County was in possession of the logs and lumber in controversy, July 13, 1903, when Buck was adjudged a bankrupt, the defendant Galloway, as trustee of the bankrupt's estate, having qualified before this suit was instituted, he became vested with the legal title to such property, and, invoking the disputable presumption that official duty has been regularly performed (B. & C. Comp, § 788, subd. 15), it must be assumed, in the absence of any evidence on the subject, that the trustee immediately took possession of the logs and lumber.

2. In controversies relating to concurrent jurisdiction the rule is elementary that the court which first acquires authority to hear and determine the merits of the case retains it for all purposes: *Farmers' L. & T. Co. v. Lake Street Ry. Co.* 177 U. S. 53 (20 Sup. Ct. 564, 44 L. Ed. 667); *Louisville Trust Co. v. Comingor*, 184 U. S. 18 (22 Sup. Ct. 293, 46 L. Ed. 413); *McFarlan Carriage Co. v. Wells*, 99 Mo. App. 641 (74 S. W. 878). In construing the provisions of the bankruptcy act of July 1, 1898, the Supreme Court of the United States held that a trustee in bankruptcy was not authorized to maintain a plenary suit in the United States district court having jurisdiction of the bankruptcy proceedings to set aside alleged fraudulent transfers of property made by the bankrupt to third parties, in fraud of the rights of creditors, before the institution of bankruptcy proceedings, unless such parties as proposed defendants voluntarily appeared and consented thereto: *Bardes v. Hawarden Bank*, 178 U. S. 524 (20 Sup. Ct. 1000, 44 L. Ed. 1175). The justice who wrote the opinion in that case also on the same day handed down another to the effect that after an adjudication in bankruptcy an action of replevin in a state court could not be commenced or maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication and in the possession of a referee in bankruptcy at the time when the action of replevin was begun, and that the district court of the United States, sitting in bankruptcy, had jurisdiction by summary proceedings to compel the return of the property seized: *White v. Schloerb*, 178 U. S. 542 (20 Sup. Ct. 1007, 44 L. Ed. 1183).

After these decisions last referred to were rendered, the bankrupt act of July 1, 1898, was amended in certain particulars: Act Feb. 5, 1903, 32 Stat. U. S. 797, c. 487 (U. S. Comp. St. Supp. 1905, p. 682, 1 Fed. Stat. Ann. 525, 533). In *Whitney v. Wenman*, 198 U. S. 539 (25 Sup. Ct. 778, 49 L. Ed. 1157), Mr. Justice DAY, referring to the opinion reported in 178 U. S. 524, and considering its applicability to Subdivision 7 of Section 2 of the bankruptcy act of 1898, says: "This case (*Bardes v. Hawarden Bank*) did not determine the right of the district

court to entertain jurisdiction of a proceeding having in view the adjudication of rights in or liens upon property which came into the possession of the bankruptcy court as that of the bankrupt, the right to proceed concerning which would seem to be broadly conferred in the section of the bankruptcy act above quoted." Further in the opinion, after commenting upon the effect of other decisions rendered by the Supreme Court of the United States, it is also observed: "We think the result of these cases is, in view of the broad powers conferred in Section 2 of the bankrupt act, authorizing the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed, and to determine controversies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein."

In *Truda v. Osgood*, 71 N. H. 185 (51 Atl. 633), which was an action of trover instituted in a state court against a trustee in bankruptcy for the alleged conversion of certain property, taken in possession by the trustee in bankruptcy as a part of the bankrupt's estate, it was held that a state court had concurrent jurisdiction of an action to determine the title to such property. In deciding that case, Mr. Chief Justice BLODGETT, speaking for the court, says: "The question raised by the agreed facts is not one of jurisdiction, but title. The plaintiff's action is not one of replevin, but of trover. It concerns, not the judicial custody or lawful possession of the property in controversy, but only the trial of the title to it. The jurisdiction conferred on the federal courts in actions of this character between trustees in bankruptcy and strangers to the bankruptcy proceedings is not exclusive; but, on the contrary, it is well settled that in all questions of title to property derived through such proceedings the state courts have concurrent jurisdiction." If it be assumed that the case last cited correctly states the

law, the rule announced is not controlling herein, for in the case at bar the right to the possession of the logs and the lumber, and not the title thereto, is involved.

3. It is insisted by plaintiff's counsel that, the demurrer of the defendant Galloway having been overruled, he answered over, praying for affirmative relief, thereby conferring jurisdiction of the subject-matter upon the state court. If the principle contended for should be recognized as a rule of practice, it would necessarily follow that a trustee in bankruptcy, by appearing as a party in a state court in a suit or action involving the right to the possession of the bankrupt's property in the custody of the United States district court, could deprive the latter tribunal of jurisdiction, notwithstanding it had secured possession of the bankrupt's estate before the jurisdiction of the state court had been invoked. Though parties to suits and actions, who are *sui juris*, may voluntarily waive jurisdiction of their persons, they cannot confer jurisdiction of the subject-matter which always depends upon a valid grant of power by the legislative department. The answers of the defendants, though praying for affirmative relief, were ineffectual to confer upon the state court power to hear and determine the controversy involved herein, after the federal court had secured jurisdiction of the *res*.

4. This suit not having been begun until after the adjudication of bankruptcy, the state court could not secure jurisdiction of the property belonging to the bankrupt's estate, the title to which was vested in the trustee who was also in the possession thereof and hence an error was committed in overruling the demurrer, which error was not waived by answering over. It follows, from these considerations, that the appellants' demurrers should be sustained, the decree of the lower court reversed, the injunction dissolved, and the suit dismissed.

REVERSED.

Decided 20 March, 1906.

ON PETITION FOR REHEARING.

MR. JUSTICE MOORE delivered the opinion of the court.

A petition for a rehearing having been filed by plaintiffs

counsel, we will consider only a few matters stated therein, deeming those treated decisive of the questions presented.

The transcript shows that this suit was commenced August 3, 1903, the complaint stating that the defendant Buck was adjudged a bankrupt by the United States District Court for the District of Oregon on June 13th of that year; that the defendant Galloway was elected trustee of the bankrupt's estate on the 22d day of the next month, and, having duly qualified, he was discharging the trust devolving upon him. It is further alleged that the trustee claims the right to take possession of all the timber, saw logs and lumber belonging to such estate and to sell the same, thereby depriving plaintiff of its equitable lien thereon, and that he will do so unless restrained by order of court. It is also stated that all of Buck's property that is subject to plaintiff's lien is insufficient to secure the payment of the sum due on account thereof. The answer of the defendant Galloway denies the material allegations of the complaint, except such as are admitted, and concedes that the sheriff of Union County seized Buck's logs and lumber under a writ of attachment issued May 7, 1903, and held the same until about the — day of July, 1903, when upon a demand therefor such property was delivered to the trustee, who holds the logs, but that the lumber had been sold pursuant to stipulation of the parties hereto that the money received therefor should be treated as the property. It is further stated that on October 3, 1903, by consideration of the Circuit Court of the State of Oregon for Union County, judgment was rendered against Buck for the sum demanded in the action instituted against him May 7, 1903, by the defendant herein the First Bank of Elgin, and that the property so attached was ordered to be sold and the proceeds arising therefrom applied in payment of such judgment; that the trustee is entitled to the possession of the attached property and to the proceeds of the sale of a part thereof, for the purpose of administering the same under the bankrupt laws of the United States. The prayer of the answer is for a decree that such attachment be declared a valid lien in the trustee's favor and that plaintiff's claim be held invalid.

The material allegations of new matter in such answer were denied in the reply.

5. The trustee in bankruptcy having alleged that the possession of the logs and lumber so attached was delivered to him, which averment was denied in the reply, the burden of proving the issue was imposed upon him. T. B. Johnson, a deputy sheriff of Union County, as defendants' witness, testified that in the action instituted by the First Bank of Elgin against Buck he attached the latter's logs and lumber May 8, 1903, and placed the same in charge of a keeper, and was asked if he knew whether or not such property was delivered to the trustee in bankruptcy, to which he replied: "I did not turn it over myself, but the records of the office show that it was." Plaintiff's counsel moved to strike out that part of the answer relating to what the records of the sheriff's office disclosed, on the ground that the same was hearsay; but, as the testimony was taken before a referee, no ruling was made thereon. The testimony so objected to was inadmissible for the reason assigned, and, no other evidence having been offered upon this branch of the case, the defendant Galloway failed to prove a relevant fact.

6. It will be remembered that the complaint states that the trustee in bankruptcy claimed the right to take possession of the logs and lumber so attached and to sell the same, which averment, though a defective statement of a fact, is, after answer, entitled to all intendments in favor of its sufficiency (*Oregon & Cal. R. Co. v. Jackson County*, 38 Or. 589, 64 Pac. 307, 65 Pac. 369; *Mellott v. Downing*, 39 Or. 218, 64 Pac. 393; *Patterson v. Patterson*, 40 Or. 560, 67 Pac. 664), and tantamount to an allegation that on August 3, 1903, when this suit was commenced, Galloway had not taken possession of such property. This averment was denied in the answer, thereby imposing upon plaintiff the burden of proving the disputed fact; but no testimony was offered thereon. In the absence of any evidence upon this issue, the presumption that official duty has been regularly performed was invoked, from which the conclusion was drawn that Galloway, as trustee of Buck's

estate, took possession of the attached property immediately upon qualifying. It is argued that the decision reached is not deducible from the conditions assumed, and that in the opinion heretofore announced the presumption mentioned was improperly applied.

The bankruptcy act of July 1, 1898, declares "that all * * attachment * * obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy * * shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt": 30 Stat. U. S. 544, 565, c. 541, § 67, subd. "f" (U. S. Comp. St. 1901, p. 3450, 1 Fed. Stat. Ann. 525, 693). The testimony clearly shows that Buck was insolvent when his logs and lumber were seized by the sheriff, and that the attaching creditor, the First Bank of Elgin, had reasonable cause to believe him unable to pay his debts. As such seizure was made within four months prior to the filing of the petition in bankruptcy, the adjudication thereof, in the absence of an order of the United States district court preserving the lien of the attachment (*Thompson v. Fairbanks*, 75 Vt. 361, 56 Atl. 11, 104 Am. St. Rep. 899), *eo instante*, rendered the qualified right of property of the First Bank of Elgin in and to Buck's logs and lumber null and void: *Alexander v. Wilson*, 144 Cal. 5 (77 Pac. 706); *In re Tune* (D. C.) 115 Fed. 906; *Clarke v. Larremore*, 188 U. S. 486 (23 Sup. Ct. 363, 47 L. Ed. 555.) It is admitted by the pleadings that the sheriff of Union County attached the logs and lumber in question May 8, 1903, but his possession thereof should not be presumed to continue after June 13th of that year, when Buck was adjudged a bankrupt (B. & C. Comp. § 788, subd. 33), assuming that the law had been obeyed: B. & C. Comp. § 788, subd. 34.

7. If it be conceded, however, that these presumptions are inapplicable, and also supposed, from the rendition of the judgment October 3, 1903, ordering a sale of the attached

property, that the sheriff was, on that day, in the possession thereof, we do not think such control of the logs and lumber sufficient to confer jurisdiction of the subject-matter of this suit upon the state court. The title to Buck's unexempt property evidently became vested in Galloway as trustee when the undertaking of the latter was confirmed by the federal court, for a certified copy of the order approving such bond affords conclusive evidence of the transfer of the bankrupt's title (30 Stat. U. S. 544, 552, c. 541, § 21, subd. "e"; U. S. Comp. St. 1901, p. 3430; 1 Fed. Stat. Ann. 525, 589), though such title, by operation of law, relates back to the date of the adjudication: 30 Stat. U. S. 544, 565, c. 541, § 70 (U. S. Comp. St. 1901, p. 3451, 1 Fed. Stat. Ann. 525, 697). The United States district court being thus constructively in possession of the bankrupt's unexempt property, a party claiming a lien thereon could not by taking possession of such property after the adjudication secure legal control thereof: *In re Gutman* (D. C.) 114 Fed. 1009. See, also, *In re Reynolds* (D. C.) 127 Fed. 760. In *Kimberling v. Hartly* (C. C.) 1 Fed. 571, it was held that, where an action is pending in a state court of competent jurisdiction to enforce a specific lien on property of the debtor, the subsequent bankruptcy of the debtor does not divest the state court of its jurisdiction to proceed to a final decree in the cause and to execute the same. To the same effect is the case of *National Bank v. Hobbs* (C. C.) 118 Fed. 626. It would seem necessarily to follow that the converse of this legal proposition is true—that, after an adjudication of bankruptcy by a federal court, a suit or action cannot be commenced in a state court, affecting the unexempt property of the bankrupt, if objection to the want of jurisdiction of the subject-matter be suitably interposed. If the sheriff of Union County had possession of Buck's logs and lumber when this suit was instituted, and the trustee was threatening to take possession thereof as alleged in the complaint, the plaintiff herein cannot take advantage of such facts; for in a suit by the trustee to determine his right of possession the state court and its officer, the sheriff, must necessarily yield all interests

in and rights to the property to the federal tribunal which first secured jurisdiction thereof, and is, therefore, authorized to administer the bankrupt's estate in the interest of the creditors. We think that jurisdiction of the subject-matter was not secured by bringing a suit against Buck in the state court, after he had been adjudged a bankrupt, regardless of who was in possession of his property at the time such suit was instituted.

8. It is maintained by plaintiff's counsel that a trustee in bankruptcy is not obliged to take possession of that part of a bankrupt's unexempt property which is so incumbered with liens that after the payment thereof nothing would remain for the creditors, and, this being so, it was improperly stated in the former opinion that Galloway could not waive jurisdiction of the subject-matter. The answer of the defendant Galloway denied that the plaintiff had any lien upon the logs or lumber in question, and the complaint averred that the trustee in bankruptcy claimed the right to take possession of such property and to sell it, thereby depriving plaintiff of its lien. The pleadings do not show any waiver by Galloway of his right to the property of the bankrupt. After the trustee's demurrer to the complaint was overruled, he answered over, setting up the attachment of Buck's property and claiming rights thereunder on behalf of the creditors of the bankrupt estate. It has been held under a former bankrupt act that when an assignee in bankruptcy makes no objection to the jurisdiction of a state court over the subject-matter, but voluntarily appears and litigates his rights therein, he and those whom he represents are bound by the judgment of such court: *Mays v. Fritton*, 87 U. S. (20 Wall.) 414 (22 L. Ed. 389); *Winchester v. Heiskell*, 119 U. S. 450 (7 Sup. Ct. 281, 30 L. Ed. 462). In the case at bar the defendant Galloway did not voluntarily appear in this suit, but challenged the jurisdiction of the state court over the subject-matter. When his demurrer, based on that ground, was overruled, he sought by answer to secure the property involved for the benefit of the creditors of Buck's estate. In *Harkness v. Hyde*, 98 U. S. 476 (25 L. Ed. 237), it was held that illegality in the service of process by which juris-

diction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside, nor, after such motion is denied, by his answering to the merits. Such illegality is considered waived only when he, without having insisted upon it, pleads in the first instance to the merits. The trustee did not in this case at first plead to the merits, but demurred; and hence he did not waive jurisdiction of the subject-matter.

It follows from these considerations that the petition for a rehearing is denied.

REVERSED: REHEARING DENIED.

Decided 26 June, 1906.

STATE v. MULLER.

85 Pac. 855.

CONSTITUTIONAL LAW—POLICE POWER—RIGHT TO LABOR.

1. The property right to labor or employ labor on terms satisfactory to the contracting parties, guaranteed by the fourteenth amendment to the federal constitution, is subject to the limitation of the right of the state, under its police power, to reasonably regulate callings that affect the public health and welfare.

CONSTITUTIONAL LAW—REGULATING HOURS OF LABOR BY FEMALES.*

2. A statute forbidding employers to require women to work more than ten hours during a day in any factory, laundry or mechanical establishment, such as Laws 1903, pp. 148, 149, § 1, does not violate the Fourteenth Amendment to the Constitution of the United States, forbidding the taking of life, liberty or property without due process of law, nor Const. Or. Art. I, § 1, declaring that all men have equal rights, nor Section 20, forbidding the granting of special privileges to particular persons, as such law is not an unreasonable or extravagant exercise of the police power over a subject deemed of vital interest to the public welfare, and does not discriminate between persons engaged in the same kind of business.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Curt Muller, the proprietor of a laundry, was convicted of requiring a woman employed in his establishment to work more than ten hours therein during a stated day, and appeals.

AFFIRMED.

*NOTE.—In 63 Central Law Journal is a series of four articles on the question of state control of labor under these headings:

The State's Right to Limit the Hours of Labor, p. 147;

Hours of Labor in Dangerous or Unhealthy Employments, p. 163;

Employment of Women and Children, p. 181;

Labor on Public Works, p. 198.

REPORTER.

For appellant there was a brief over the names of *William David Fenton* and *E. S. J. McAllister*, with an oral argument by *Mr. Fenton*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General, *John Manning*, District Attorney, and *Bert Emory Haney*, with an oral argument by *Mr. Haney*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

In 1903 the legislature passed an act which, among other things, provided that "no female [shall] be employed in any mechanical establishment, or factory, or laundry in this State more than 10 hours during any one day" and that "any employer who shall require any female to work in any of the places mentioned" more than the prohibited time "shall be guilty of a misdemeanor, and upon conviction thereof shall be" punished, etc.: Laws 1903, p. 148. The defendant was convicted for a violation of this act by requiring a female to work more than the prescribed time in a laundry. He appeals to this court on the ground that the law is unconstitutional and void, as violative of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law," and of Sections 1 and 20 of Article I of the constitution of this State, as follows:

Section 1. "We declare that all men, when they form a social compact, are equal in rights."

And Section 20:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

1. The right to labor, or employ labor, on such terms and conditions as may be agreed upon by the interested parties, is not only a liberty but a property right guaranteed to every citizen by the Fourteenth Amendment to the Constitution of the United States, and cannot be arbitrarily interfered with by the legislature: *Lochner v. New York*, 198 U. S. 45 (25 Sup. Ct. 539, 49 L. Ed. 937); *Ex parte Kuback*, 85 Cal. 274 (24 Pac. 737, 9 L. R. A. 482, 20 Am. St. Rep. 226); *Frorer v.*

People, 141 Ill. 171 (31 N. E. 395, 16 L. R. A. 492); *State v. Loomis*, 115 Mo. 307 (22 S. W. 350, 21 L. R. A. 789); *Low v. Rees Printing Co.*, 41 Neb. 127 (59 N. W. 362, 24 L. R. A. 702, 43 Am. St. Rep. 670); *Seattle v. Smyth*, 22 Wash. 327 (60 Pac. 1120, 79 Am. St. Rep. 939). But the amendment was not designed or intended to limit the right of the state, under its police power, to prescribe such reasonable regulations as may be necessary to promote the welfare, peace, morals, education or good order of the people, and therefore the hours of work in employments which are detrimental to health may be regulated by the legislature: *Holden v. Hardy*, 169 U. S. 366 (18 Sup. Ct. 383, 42 L. Ed. 780).

The right to labor and to contract for labor, like all rights, is itself subject to such reasonable limitations as are essential to the peace, health, welfare and good order of the community, and, as said by the Supreme Court of the United States: "A large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests": *Lawton v. Steele*, 152 U. S. 133 (14 Sup. Ct. 499, 38 L. Ed. 385). In *Holden v. Hardy*, 169 U. S. 366 (18 Sup. Ct. 383, 42 L. Ed. 780), the court, referring to the limitations placed by a state upon the hours of workmen in underground mines, said: "These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts." And in the subsequent case of *Gundling v. Chicago*, 177 U. S. 183 (20 Sup. Ct. 633, 44 L. Ed. 725), the court uses this language: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and unless the regulations are so utterly unreasonable and extravagant in their

nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference." The legislature may not, therefore, unduly interfere with the liberty of contract, or arbitrarily limit the right of a citizen to enter into such contracts as to him may seem expedient or desirable; but it may prescribe reasonable regulations in reference thereto and limitations thereon to promote the general welfare and guard the public health, and the power of the courts to review such regulations exists only "when that which the legislature has done comes within the rule that if a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is beyond all question a plain, palpable invasion of rights secured by the fundamental law": *Jacobson v. Massachusetts*, 197 U. S. 11, 31 (25 Sup. Ct. 358, 49 L. Ed. 643).

2. Now, the statute in question was plainly enacted, although not so declared therein, in order to conserve the public health and welfare by protecting the physical well-being of females who work in mechanical establishments, factories and laundries. Such legislation must be taken as expressing the belief of the legislature, and through it of the people, that the labor of females in such establishments in excess of 10 hours in any one day is detrimental to health and injuriously affects the public welfare. The only question for the court is whether such a regulation or limitation has any real or substantial relation to the object sought to be accomplished, or whether it is "so utterly unreasonable and extravagant" as to amount to a mere arbitrary interference with the right to contract. On this question we are not without authority. Legislation limiting the hours during which women may be employed is in force in several of the states of the Union, and, so far as we are advised, such legislation has everywhere been upheld, except in the State of Illinois. This particular class of legislation was first

enacted in Massachusetts, and came before the supreme court of that state in *Commonwealth v. Hamilton Mfg. Co.* 120 Mass. 383. The law provided that "no minor under the age of 18 years, and no woman over that age, shall be employed in laboring by any person, firm or corporation in any manufacturing establishment in this commonwealth more than 10 hours in any one day," except in certain cases, and that "in no case shall the hours of labor exceed 60 per week." This law was held valid, the court declaring that it was not in violation of any rights reserved to the individual citizen, because "it merely provides that in an employment which the legislature has evidently deemed to some extent dangerous to health no person shall be engaged in labor more than 10 hours a day or 60 hours a week. There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in this commonwealth that reference to the decisions is unnecessary." And it was held that the law did not violate the right of the female employee to labor in accordance with her own judgment as to the number of hours she should work, because it merely prohibited her being employed continuously in the same service more than a certain number of hours during a day or week, leaving her free to work elsewhere as many hours as she might desire.

In 1899 the legislature of Nebraska (Laws 1899, p. 362, c. 107) enacted a law providing that "no female shall be employed in any manufacturing, mechanical or mercantile establishments, hotel or restaurant in this state more than sixty hours during any one week and that ten hours shall constitute a day's labor." This legislation was upheld by the court on the ground that it was a reasonable regulation to promote the public good and to protect the health and well-being of women engaged in labor in the establishments mentioned in the act, and therefore came within the police powers of the state: *Wenham v. State*, 65 Neb. 394, 405 (91 N. W. 421, 58 L. R. A. 825). The court said: "Women and children have always, to

a certain extent, been wards of the state. Women in recent years have been partly emancipated from their common-law disabilities. They now have a limited right to contract. They may own property, real and personal, in their own right, and may engage in business on their own account. But they have no voice in the enactment of the laws by which they are governed, and can take no part in municipal affairs. They are unable, by reason of their physical limitations, to endure the same hours of exhaustive labor as may be endured by adult males. Certain kinds of work, which may be performed by men without injury to their health, would wreck the constitutions and destroy the health of women, and render them incapable of bearing their share of the burdens of the family and the home. The state must be accorded the right to guard and protect women, as a class, against such a condition; and the law in question, to that extent, conserves the public health and welfare."

In 1901 a similar statute was enacted in the State of Washington, and was held valid by the supreme court in *State v. Buchanan*, 29 Wash. 602 (70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930), Mr. Justice DUNBAR saying: "It is a matter of universal knowledge with all reasonably intelligent people of the present age that continuous standing on the feet by women for a great many consecutive hours is deleterious to their health. It must logically follow that that which would deleteriously affect any great number of women, who are the mothers of succeeding generations, must necessarily affect the public welfare and the public morals. Law is, or ought to be, a progressive science. While the principles of justice are immutable, changing conditions of society and the evolution of employment make a change in the application of principles absolutely necessary to an intelligent administration of government."

The case of *Ritchie v. People*, 155 Ill. 98 (40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315), is the only decision to which our attention has been called, or which we have been able to find, in which an act of the kind under consideration has been (48th Or.—17)

held unconstitutional and void. The case is well considered and ably presented, but is, we think, borne down by the weight of authority and sound reason. We are of the opinion, therefore, that the act in question is not void because an arbitrary and unwarranted limitation of the right of contract, but is within the police power of the state.

Nor can we concur with counsel that it is an arbitrary and unwarrantable discrimination against persons engaged in the particular businesses or employments specified, because persons in other businesses or callings are not prohibited from requiring or permitting their female employees to work more than 10 hours a day. Nearly all legislation is special in the objects sought to be obtained or in its application, and the general rule is that such legislation does not infringe the constitutional right to equal protection of the laws when all persons subject thereto are treated alike under like circumstances and conditions: *In re Oberg*, 21 Or. 406 (28 Pac. 130, 14 L. R. A. 577); *Ex parte Northup*, 41 Or. 489 (69 Pac. 445). "The discriminations which are open to objection," says Mr. Justice FIELD, in *Soon Hing v. Crowley*, 113 U. S. 703, 709 (5 Sup. Ct. 730, 28 L. Ed. 1145), "are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges, under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

The judgment is affirmed.

AFFIRMED.

Argued 22 March, decided 24 July, 1906.

WARNER VALLEY STOCK CO. v. MORROW.

86 Pac. 369.

PUBLIC LANDS—PATENT—NEED OF DELIVERY AND ACCEPTANCE.

1. A patent from the United States to a state for public land is not open to the objection of incompetency without evidence that it was received by the state or some authorized agent, as the mere execution of a patent by the United States officers is sufficient to pass the title without delivery, the patent being a public record.

CONCLUSIVENESS OF STATE DEED ON COLLATERAL ATTACK.

2. The State Land Board being the land department of the State of Oregon, its deeds are conclusive as to the right to convey the land therein described, and are not open to collateral attack in a law action.

RIGHT OF STATE TO DEED MORE THAN 320 ACRES TO ONE PERSON.

3. A deed from the State Land Board of Oregon for more than 320 acres of state land to one person is not void on its face for want of authority in the grantor to convey more than that quantity of such land, though the law limits to 320 acres the amount of any one purchase, for certificates of sale are transferrable, and one deed may be made for the total of many purchases that have been lawfully acquired by one person.

PUBLIC LAND—TITLE BY RELATION THROUGH PATENT.

4. The title of a patentee of swamp land from the State of Oregon relates to the date of the grant from the United States to the state, and carries the title as though it had been then executed.

CONCLUSIVENESS OF PATENT ON COLLATERAL ATTACK—PRESUMPTION.*

5. Where the officers of the government, federal or state, have issued a patent in due form of law which on its face is sufficient to convey title to the land therein described, it will be conclusively presumed by courts of law that all prerequisites to the issuance of a valid patent were complied with, and therefore the title is not open to collateral attack in a law action.

TIMBER CULTURE CLAIMS—EFFECT OF DEATH OF CLAIMANT.

6. The death of a timber culture entryman before making final proof entirely ends his rights to the land and any deed that may thereafter issue to his heirs for such land runs to them directly from the government and not through their ancestor. An administrator of the estate of such a claimant has no rights whatever as to the land so entered.

From Lake: HENRY L. BENSON, Judge.

Statement by MR. JUSTICE HAILEY.

This is an action by the Warner Valley Stock Co., a corporation, against J. L. Morrow, to recover the possession of real property in Lake County, Oregon, described as the N. W. $\frac{1}{4}$ of section 35 in township 39 S., range 24 E. of the Willamette Meridian. The appeal is from a judgment in favor of the plaintiff. The complaint is in the usual form. The answer "denies each and every allegation of the complaint except as hereinafter admitted and averred," and then sets up as affirmative defenses (1) the statute of limitations, and (2) adverse possession, neither of which was urged at the hearing or in the brief; (3) legal title of the lands in the United States; and (4) defendant's claim thereto under a timber culture filing by one John W. Morrow, substantially as follows: That on March 12, 1888, John W. Morrow, being qualified to acquire lands from the United States under the homestead and pre-

*NOTE.—As to the conclusiveness and finality of the decisions of the land department of the United States concerning matters within its jurisdiction, see note in 89 Am. St. Rep. 152 collecting many authorities.

emption laws, settled upon the lands described in the complaint with intent to acquire title thereto as a timber culture claim under the laws of the United States, and on March 15, 1889, duly made and filed his timber culture application for said lands in the United States land office at Lakeview, Oregon, and paid all fees and costs of such entry, and received his receipt and certificate of entry from the register and receiver; and that such entry was made in good faith and for the sole purpose of acquiring said land as a timber culture claim; and that thenceforth he continuously resided upon and improved said land and offered to make final proof thereon up to the time of his death on the — day of —, 190—; that since the death of John W. Morrow, the defendant has been appointed the administrator of his estate and entered into possession of said land and ever since has been, and now is, such administrator, and in possession of said property as administrator, and not otherwise; "that from and since the date of making said entry defendant has been in the actual and exclusive possession and occupation of said land," and that said tract of land was on March 12, 1860, and on March 12, 1888, dry land suitable for agricultural purposes, and never was swamp nor overflowed land nor mineral land, nor sold or disposed of by the United States in any way for any purpose whatever, but was public land belonging to the United States, subject to said timber culture entry of John W. Morrow as aforesaid; and that the defendant was at the commencement of this action and still is the owner of a legal estate in said tract of land and in the actual possession and entitled to the possession of the same. A reply was filed to this answer, denying all of its material allegations, except possession on the part of the defendant and the making of the timber culture entry by John W. Morrow, and alleging the cancellation of such timber culture entry by the Secretary of the Interior on March 16, 1903.

At the trial the plaintiff offered in evidence a certified copy of the patent from the United States to the State of Oregon for the lands in question and other lands amounting to about 3,000 acres, dated October 6, 1903, properly executed and duly

recorded in the United States General Land Office and also in the office of the County Clerk of Lake County, Oregon, which patent recites that "the several tracts or parcels of land hereinafter described have been selected as 'Swamp and Overflowed Lands' inuring to the said state under the act aforesaid." "And for which the Governor of the State of Oregon has requested a patent issued to the said State as required in the aforesaid acts." The defendant objected to the introduction of this patent "for the reason that it was incompetent and immaterial and that it does not show on its face that it was ever received by the State of Oregon or by any officer of the State of Oregon authorized to receive the same; that it is not recorded in any of the state land records, and does not purport to be and there is nothing to show that it has ever been received or accepted in any manner by the State of Oregon"; and also offered to show that the patent had never been received or accepted by the State of Oregon, which objection and offer were overruled. The plaintiff then offered in evidence a certified copy of the patent from the State of Oregon to the plaintiff covering the lands in controversy, dated June 23, 1899, which patent included about 5,000 acres of other land. Defendant objected to the introduction of this for two reasons: (1) It conveyed more than 320 acres of land to one person, whereas the state law limits the sale of state lands to any one person to 320 acres; and (2) at the time of the execution of the deed the State of Oregon had no title. The objection was overruled. Plaintiff then rested, and defendant moved the court to instruct the jury to return a verdict for the defendant on the ground that (1) there was no evidence showing defendant in possession of the land at the commencement of the suit; (2) there was no evidence of title having been proven. This motion was overruled and a motion for a nonsuit was also overruled.

The defendant then offered in evidence certified copies of certain powers of attorney and deeds and applications to purchase swamp lands, and records of the proceedings of the State Land Board covering the lands in question and other lands prior to the issuance of the patent by the State to the plaintiff,

all which were excluded. Defendant then offered testimony tending to show that the Governor of the State had on July 27, 1903, and at subsequent dates, refused to accept or receive any patent or approve the list of swamp lands which included the lands in controversy, and had protested against the issuance of any patent to the State of Oregon for such lands, which was also excluded. Defendant also offered evidence to prove that the land in controversy was in 1884 dry land and neither swamp nor overflowed within the act of Congress of 1860 granting such lands to the State of Oregon, which was also excluded. After the defendant rested, the plaintiff moved the court to instruct the jury to bring in a verdict in favor of the plaintiff, which motion was allowed, and a verdict found in favor of the plaintiff, and judgment entered, from which this appeal was taken. AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Edward Byers Watson*, *Mr. John Hicklin Hall* and *Mr. Andrew Murray Crawford*.

For respondent there was a brief over the names of *Charles Amos Cogswell* and *Coover & Stapleton*, with oral arguments by *Mr. Cogswell* and *Mr. E. E. Coover*.

MR. JUSTICE HAILEY delivered the opinion of the court.

1. The objection to the introduction in evidence of the certified copy of the patent of the United States to the State was not well taken. The law is well settled that title by patent from the United States is title by record, and the delivery of the patent to the patentee is unnecessary to pass title as in the conveyance by a private person: *United States v. Schurz*, 102 U. S. 378 (26 L. Ed. 167); *Eltzroth v. Ryan*, 89 Cal. 135-139 (26 Pac. 647); *Le Roy v. Clayton*, 2 Sawy. 493 (Fed. Cas. No. 8,268); 26 Am. & Eng. Encyc. Law (2 ed.), 421.

2. The objection to the patent from the State to the plaintiff is based upon Section 4, p. 42, of the Session Laws of 1878,* authorizing the sale of not exceeding 320 acres to any one person. This, however, is untenable. The state land board under our law is the land department of the State: *Corpe v. Brooks*,

*Laws 1878, pp. 41, 42, § 4.

8 Or. 223; *Robertson v. State Land Board*, 42 Or. 183, 187 (70 Pac. 614). And, as stated by Mr. Justice FIELD in *Smelting Co. v. Kemp*, 104 U. S. 646 (26 L. Ed. 875): "A patent, in a court of law, is conclusive as to matters properly determinable by the land department when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances exist": *Eastern Oregon Land Co. v. Andrews*, 45 Or. 203, 210 (77 Pac. 117).

3. This court has held in *Gliem v. Board of Commissioners*, 16 Or. 479 (19 Pac. 16), that a person who has purchased from the state land board the maximum quantity of land allowed to be purchased by one person is not thereby disqualified from taking an assignment of a certificate of purchase from the board to another applicant under the act and receiving a deed from the board for such lands in his own name. It being possible under the law for the plaintiff to have purchased certificates from other persons and have the lands conveyed to it, the court could not say from the mere number of acres conveyed that the patent was void, and rightly overruled the objection to its introduction upon that ground.

4. The question raised by the objection as to the title of the State at the time of the issuance of its patent to the plaintiff is disposed of adversely to the defendant herein in the case of *Warner Stock Co. v. Calderwood*, 36 Or. 228-233 (59 Pac. 115), which holds that the plaintiff's title, upon the issuance of the patent from the United States, relates back to the date of the grant to the State, March 12, 1860, when the swamp land act was extended to Oregon.

5. The evidence offered to prove the land was not swamp land, and the records and proceedings of the state land board, were properly rejected, for such evidence was an attempt to impeach the patent from the Government to the State and the

patent from the State to plaintiff, and was clearly not admissible in a law action: *Sanford v. Sanford*, 19 Or. 4 (13 Pac. 602); *Warner Stock Co. v. Calderwood*, 36 Or. 228-233 (59 Pac. 115); *Small v. Lutz*, 41 Or. 570-578 (69 Pac. 825); *Smelting Co. v. Kemp*, 104 U. S. 645 (26 L. Ed. 875). Where the authorized officers of the government have issued a patent in due form of law which on its face is sufficient to convey the title to the land described in it, it will be presumed that all the prerequisites to the issuance of a valid patent have been complied with, and the title conveyed is impregnable to collateral attack: 26 Am. & Eng. Encyc. Law (2 ed.), 390. The reason of this rule is fully and ably stated in *Smelting Co. v. Kemp*, 104 U. S. 645 (26 L. Ed. 875), as follows: "The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned and sealed, not merely operates to pass the title, but is in the nature of an official declaration

by that branch of the government to which the alienation of the public lands under the law is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief—indeed, its only—value as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the land department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation.”

6. The only remaining question is upon the exclusion of the testimony offered regarding the protest of the Governor against the issuance of the patent by the United States, and his refusal to accept such patent. The defendant claims no legal title to the land in controversy, and his answer fails to show any equitable title therein. He alleges legal title in the United States, and for himself sets up the claim of a timber culture entry made by his intestate, John W. Morrow, in 1889, but in no way connects himself with such entry. The death of a timber culture entryman who has not made final proof ends his estate in the land claimed, and his heirs, if any, take the land as grantees of the government, and not by inheritance. Therefore, the defendant could have no right in the land as administrator, and he has not alleged any fact that would give him any right as heir, and hence as grantee of the government under the timber culture act: *Kelsay v. Eaton*, 45 Or. 70 (76 Pac. 770, 106 Am. St. Rep. 662); *Cooper v. Wilder*, 111 Cal. 199 (43 Pac. 591, 52 Am. St. Rep. 163). He is therefore a stranger to the title, and cannot question the rights of the plaintiff under either of the patents: *Stewart v. Altstock*, 22 Or. 182-190 (29 Pac. 553); *Schieffery v. Tapia*, 68 Cal. 184-186 (8 Pac. 878).

Finding no error in the judgment of the lower court, it is affirmed.

AFFIRMED.

Decided 17 July, 1906

MILLER v. UNION COUNTY.

86 Pac. 3.

ESTABLISHMENT OF HIGHWAYS—ADOPTION OF REPORT OF VIEWERS.

1. Under a statute directing that the report of viewers appointed to lay out a proposed county road and assess the resulting damages shall be "adopted" by the county court (Laws 1903, pp. 262, 267, §15), an order that the report be "approved" is sufficient, as the two words are practically synonyms.

ESTABLISHING HIGHWAYS—FINALITY OF ORDER ASSESSING DAMAGES.

2. Under a statute providing for a board to assess the damages resulting from the opening of a proposed county road, and giving the county court power to order the damages paid by the county or by the petitioners, and to order the road opened (Laws 1903, pp. 262, 264, §11), the order assessing the damages is a final order that may be appealed from, though the order declaring the road a public highway may not be entered until later.

From Union: ROBERT EAKIN, Judge.

Statement by MR. JUSTICE MOORE.

This is a claim for damages which it is asserted the owner of certain real property will sustain if a public road is established across his premises. Dillie Randall and others petitioned the county court of Union County to lay out a county road therein, and, having complied with all the jurisdictional requirements, the board of county road viewers were ordered to meet at a time and place specified, and view, survey and lay out a road on the line designated. This order was obeyed, and the board on August 2, 1905, filed their report, recommending that the prayer of the petition be granted, and also finding that by the location of the proposed road the premises of the plaintiff, George Miller, would be rendered less valuable in the sum of \$100, from which award he appealed to the county court. The report of the board was publicly read on two different days of the same session, in which it was filed, and the matter was continued for the term. This report was, on September 8, 1905, approved as to the damages to the premises of the plaintiff and the papers in the cause were referred to the district attorney. The matter was thereupon further continued from term to term until January 5, 1906, when it was ordered by the county court that the road as surveyed be declared a public highway, upon the petitioners paying to the county clerk for Miller the sum

of \$100. Seventeen days thereafter the plaintiff served and filed a notice of appeal and gave a proper undertaking therefor, and the transcript having been sent up to the circuit court for that county, the appeal was dismissed, and he appeals from such judgment to this court.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Charles H. Finn*.

For respondent there was a brief over the names of *Clarence H. Crawford*, District Attorney, and *J. D. Slater*, with an oral argument by *Mr. Robert Jay Slater*.

MR. JUSTICE MOORE delivered the opinion of the court.

The question to be considered is whether or not the order of the county court of September 8, 1905, approving the report of the board of county road viewers as to plaintiff's claim for damages was a final judgment. The statute prescribing the method of establishing county roads provides, in effect, that it shall be the duty of the county court, on receiving the report of the board of county road viewers, to cause the same to be read publicly on two different days of the same term, and if no petition for damages be filed, and the court is satisfied that such road will be of public utility, the report of the viewers being favorable thereto, they shall cause the report, etc., to be recorded, and from thenceforth such road shall be considered a public highway: Laws 1903, pp. 262, 264, § 11. The viewers, while laying out county roads, are required to assess and determine how much less valuable the premises through which a road is to be located will be rendered by opening the same as a highway and set forth such estimate in their report, which shall be considered as the true measure of damages in such cases, provided that any person feeling aggrieved by such assessment may appeal to the county court, and also from the decision of such court to the circuit court: Laws 1903, pp. 262, 267, § 13. If the county court is satisfied that the amount of damages so assessed is just and equitable, and that the proposed road will be of sufficient importance to the public to cause the damages so assessed and determined to be paid by the county, the court

shall order the same paid to the complainant out of the county treasury; but if, in the opinion of the court, such proposed road is not of sufficient importance to the public to cause the damages to be paid to (by) the county, the court may refuse to establish the same as a public highway, unless the expense or damages or some part thereof, as the court may think proper, shall be paid by the petitioners: Laws 1903, pp. 262, 267, § 14. Any complainant who may conceive himself aggrieved by the assessment of damages as prescribed by the last two sections may, within 20 days after such report is adopted by the court, appeal therefrom to the circuit court of the proper county: Laws 1903, pp. 262, 267, § 15. It shall be the duty of the county court, before any proposed county road is finally established and ordered open, to submit all the files and records of the proceedings had therein to the district attorney of that county for inspection, whose duty it shall be to advise the county court as to the legality of the proceedings: Laws 1903, pp. 262, 285, § 78.

It is argued by plaintiff's counsel that, construing these provisions together, all matters relating to the location of a county road are *in fieri* until the highway is declared established, and that an order made by a county court prior thereto in respect to the assessment of damages is only a step in the proceedings and therefore not final. In construing the provisions of an earlier statute of similar import, it was ruled that an appeal to the circuit court from the assessment of damages in road matters brought up only the question of the injury sustained by the opening of a highway through a person's premises, and did not involve the regularity of the other proceedings: *Fanning v. Gilliland*, 37 Or. 369 (61 Pac. 636, 62 Pac. 209, 82 Am. St. Rep. 758); *McCall v. Marion County*, 43 Or. 536 (73 Pac. 1031, 75 Pac. 140). In *Hammer v. Polk County*, 15 Or. 578 (16 Pac. 420), a proposed county road having been surveyed across certain lands, a claim for damages in consequence thereof was filed, whereupon the county court, pursuant to the law then in force, appointed three householders to examine the premises and report how much less valuable they would be rendered by

reason of the location of the road. The persons so appointed performed the duty devolving upon them, and filed their report to the effect that the premises in question were not damaged, but that the land through which the road was proposed to be located was of the value of \$15 per acre. The county court thereupon found that the damages to such land was \$45, accepted and approved the report, and ordered that upon the payment by the petitioners of the sum so awarded such road should be declared a public highway. Within 20 days from the making of the order approving the report, the claimant appealed therefrom to the circuit court, which dismissed the appeal on the ground that the order referred to was not final, and from such judgment the claimant appealed to this court. In deciding the case it was held that an appeal would lie from an order determining the amount of damages, if taken within 20 days after the report of the householders was adopted. Mr. Justice STRAHAN, speaking for the court in construing a provision of the statute identical with Section 15 of the Laws of 1903, hereinbefore adverted to, says: "The court might have refused to establish the road as a public highway as long as the proceedings to assess damages were pending on appeal; but the record discloses that pending the appeal the petitioners paid the damages assessed, and the county court established the road. But these proceedings in no way affected appellant's right to prosecute his appeal and to have a jury pass upon the amount of his damages."

Though an appeal lies from an assessment of damages as indicated, the action of a county court in establishing a county road can be re-examined only by a writ of review: *Leader v. Multnomah County*, 23 Or. 213 (31 Pac. 481). It will be seen that a reinvestigation of the question of an assessment of damages sustained by the laying out of a county road and of the establishing of a public highway is secured by adopting procedure essentially different, thereby preserving the distinction existing in these matters. Since the opinion in *Hammer v. Polk County*, 15 Or. 578 (16 Pac. 420), was announced, the statute has been amended so that a board of county road view-

ers, consisting of the county surveyor, the county roadmaster and one qualified freeholder, take the place of the viewers theretofore appointed and also perform the duties of the householders who prior thereto assessed the damages sustained by the opening of a road, if any compensation therefor were claimed: Laws 1903, pp. 262, 264, §§ 9, 10, 11. Under the former law, in case damages were claimed by any person through whose land a county road was marked out, two reports were made, to wit, the viewers' opinion as to the merits of the petition and the householders' assessment of the damages sustained. The law now in force imposes on the board of county road viewers the duty to lay out all proposed roads, to assess and determine the damages which would result by the opening thereof, and to file with the county court their report, showing a performance of the service required. Because one report now takes the place of two under the former law, no reason can be perceived why the rule adopted in *Hammer v. Polk County* should not be controlling, when that part of the report relating to the damages assessed is adopted by the county court. The statute provides that any person who conceives himself aggrieved by the assessment of damages may appeal therefrom to the circuit court at any time within 20 days after the report of the board of county road viewers is adopted: Laws 1903, pp. 262, 267, § 15.

1. In the case at bar the county court made and entered in its records the following direction:

"It is ordered that the report of the board of road viewers, made and filed in said cause, as to the damages to the premises of George Miller, to wit, in the sum of one hundred dollars, be, and the same is, hereby approved."

It is maintained by plaintiff's counsel that, as the statute requires the report of the viewers to be "adopted," an order whereby it was "approved" is not a compliance with the requirements of law. To adopt means to approve: *Webst. Int. Dic.*; *Dallas v. Beeman*, 18 Tex. Civ. App. 335 (45 S. W. 626). These words being synonymous, the use of the latter term by the county court clearly expresses its intention and sufficiently conforms to the legal mandate.

2. The order of a county court adopting the report of the

board of county road viewers as to the damages which will result to a landowner if a proposed road surveyed through his premises is opened, though made before the road is declared a public highway, is an adjudication of the sum, if any, found to be due such owner; but it is not a determination as to whether the county or the petitioners shall pay the whole or any part thereof. The question as to who will be required to pay such award, where a preliminary order is made as to the damages, necessarily remains in abeyance until the report of the board of county road viewers, as to their opinion in favor of establishing such road, has been finally passed upon. If the report as to the damages is not acted upon by the county court until the inquiry is considered as to whether or not the proposed road shall be declared a public highway, and the latter question is determined in the negative, no necessity would exist for taking an appeal. Should this question be concluded in the affirmative, however, and damages are awarded, the payment of which is assumed by the county, the applicant for compensation might, on appeal, secure a much larger sum, thus imposing on the municipality a burden which it would not have undertaken in the first instance, if the county court could have known what the result would have been; for, the proposed road having been declared a public highway, the payment of the judgment would become imperative. When the county court adopts the report of the viewers as to the assessment of damages, but defers the consideration of the question as to whether or not the proposed county road shall be declared a public highway until the issue of damages has been finally determined, if the sum thus awarded could not be paid by the petitioners and was deemed too excessive to be borne by the county, the prayer of the petition for laying out the road could be denied, thereby avoiding the payment of any judgment for damages against the county and escaping the result of the adjudication by the payment of the costs and disbursements only, in case the appellant recovered a judgment more favorable than the report appealed from. These possible results induce the conclusion that a county court may adopt the report of a board of county road viewers, and that the assess-

ment of damages can be finally determined before the proposed county road is declared a public highway. Nor does the fact that a county court is required to submit to the district attorney all the files and records of the proceedings on a petition for the location of a proposed county road before it can be ordered open, alter the deduction that the preliminary question of the assessment of damages may be determined before the matter is so referred.

Believing that a fair construction of the provisions of the statute to which attention has been called warrants the determination that the order of the county court of September 8, 1905, approving the report of the board of county road viewers, so far as it related to the damages sustained by the plaintiff was final, it follows that, as no appeal was taken therefrom within the time prescribed, the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Decided 17 July, rehearing denied 21 August, 1906.

FRAME v. OREGON LIQUOR CO.

85 Pac. 1009, 86 Pac. 791.

PRIVATE LETTER AS EVIDENCE.

1. A letter forming part of a correspondence between the parties to an action and concerning the subject-matter in dispute is competent evidence, being on the same footing as a conversation.

TROVER AND CONVERSION—EVIDENCE—ADMISSIBILITY.

2. Where, in an action for conversion, it was shown that the goods had been bought by a third person, and placed in plaintiff's possession charged with the duty of forwarding them to the third person when ordered and that defendant, a creditor of the third person, had obtained possession of them from the plaintiff by a trick and without authority, evidence that the seller had demanded possession from plaintiff was admissible as showing that he had exercised the right of stoppage in transitu and that plaintiff had been compelled to settle for the goods.

SALES—STOPPAGE IN TRANSITU—DURATION OF TRANSIT.

3. A seller on credit may resume possession of the goods while they are in the hands of a carrier or middleman in transit to the buyer, if the latter becomes insolvent; and this right continues until the delivery of the goods to the buyer or his agent, as against the right of seizure under legal process by creditors of the buyer.

SAME—CASE UNDER CONSIDERATION.

4. A seller having shipped goods to a buyer living back from a railroad, the buyer directed a forwarding teamster to receive such goods from the railroad company and store them until further orders. Before giving any further directions the buyer became insolvent, and the seller

demanding possession, claiming the right to rescind the sale, no payment having been made, and to stop the goods in transit. *Held*, that the teamster was merely a forwarding agent, and that property in his hands consigned to such buyer was still in transit.

PLEADING IN TROVER—ALLEGATIONS AND PROOFS UNDER DENIAL.

5. Where, in an action for conversion, the defense was that the goods were the property of a debtor of defendant and had been attached and sold, it was competent for plaintiff to show that the goods which had been sold to the debtor had never been delivered to him, but were in transit at the time defendant obtained possession, and that subsequently the seller exercised the right to stop the goods in transit and annul the sale, without especially pleading such facts, they being admissible under a denial of the attachment and sale as tending to show that the property did not belong to the debtor when seized.

SALES—MANNER OF ASSERTING RIGHT TO STOP IN TRANSIT.

6. No particular form is required in asserting the right of stoppage in transit, and it may be done by another at the request of the debtor, as well as by the debtor himself.

From Baker: SAMUEL WHITE, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by R. W. Frame, doing business as the Frame Forwarding Co., against Ben Grunbaum and Lee Hirschland, doing business as the Oregon Liquor & Cigar Co., to recover damages for the conversion of personal property. The plaintiff is engaged in the warehouse and forwarding business at Huntington, a station on the Oregon Railroad & Navigation Co.'s railroad. Some time prior to December, 1903, one Olsen, a liquor and cigar dealer at Drewsey, a town about 60 miles from Huntington, ordered certain goods of the defendants, who were doing business in Baker City, and also of Meyer, Mish & Co., of San Francisco, and Palm, Whitman & Co., of Medford, in this State. These goods were all sold on credit, and consigned by the respective sellers to Olsen at Drewsey by way of Huntington. When they reached Huntington they were received by plaintiff from the railroad company under authority from Olsen and stored in his warehouse to be transported to Drewsey by team when ordered by Olsen. While the goods were thus in the possession of the plaintiff, Olsen became insolvent, and defendants, representing that they had an order from him for all such goods, directed plaintiff to ship them to Baker City, which was done accordingly. The goods reached the defendants on the 10th of December and on or about the 15th they commenced

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an action at law against Olsen to recover a balance due on account, and the goods purchased by him from Meyer, Mish & Co. and Palm, Whitman & Co. were attached. On December 24th the plaintiff received notice of Olsen's failure, and an order from him to return the goods to the original consignors. He thereupon demanded possession from the defendants of the Meyer, Mish & Co. and Palm, Whitman & Co. goods; but they refused to return the same to him, claiming that they had been attached as stated. The defendants subsequently recovered judgment against Olsen, and caused the goods to be sold under an execution issued thereon. The possession of the goods was afterwards demanded of the plaintiff by Meyer, Mish & Co. and Palm, Whitman & Co., and, being unable to deliver them, he paid the value thereof, and subsequently commenced this action against the defendants for a wrongful conversion. The complaint sets up the facts substantially as stated. The answer pleads in substance that the goods had been delivered to and were the property of Olsen and sets up the attachment and sale under execution as a defense. The plaintiff had judgment, and defendant appeals, assigning error in the admission of evidence and in the giving and refusal of certain instructions.

AFFIRMED: REHEARING DENIED.

For appellants there was a brief over the name of *Hart & Smith*, with an oral argument by *Mr. Julius Newton Hart*.

For respondent there was a brief and an oral argument by *Mr. John Langdon Rand*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

There are many assignments of error, but they may be grouped under substantially three heads: (1) The admission in evidence of a letter written by the plaintiff to the defendants on December 30, 1903, notifying them of the order from Olsen to return the goods to the consignors and asking for a copy of the order which they had represented they had from Olsen for the possession of the goods, and intimating that if they did not have such an order plaintiff would be constrained to commence legal proceedings to recover the goods or their value; (2) the

admission of evidence tending to show that Meyer, Mish & Co. and Palm, Whitman & Co. demanded of the plaintiff possession of the goods consigned by them to Olsen, and of plaintiff's subsequent settlement with such firms; (3) instructions of the court concerning the right of a seller of goods to stop them *in transitu*.

1. The letter complained of was a part of the correspondence had between the plaintiff and the defendants concerning the goods in question, and was clearly competent testimony. It was a part of, and explanatory of, the transaction between the parties, and stood practically on the footing of a conversation between them: *Lee v. Cooley*, 13 Or. 433 (11 Pac. 70).

2. The evidence that Meyer, Mish & Co. and Palm, Whitman & Co. had demanded possession from plaintiff of the goods consigned by them to Olsen was competent as tending to show that they had exercised the right of stoppage *in transitu*, and that plaintiff had been compelled to settle with them for the goods of which the defendants had wrongfully obtained possession.

3. The objection to the instructions concerning the right of Meyer, Mish & Co. and Palm, Whitman & Co. to stop the goods ordered from them by Olsen in transit is two-fold. First that the right of stoppage *in transitu* ceased when the goods were delivered by the railroad company to the plaintiff, and second such instructions were outside of the issues made by the pleadings. In case of a sale of goods on credit the vendor may resume possession of the goods while they are in the hands of a carrier or middleman in transit to the vendee or consignee on his becoming insolvent: *Buckley v. Furniss*, 15 Wend. 137; Newmark, Sales, § 413; Hutchinson, Carriers (2 ed.), § 415. This right continues until the delivery of the goods to the consignee or his agent is completed (26 Am. & Eng. Encyc. Law (2 ed.), 1088; 2 Mechem, Sales, § 1537), and cannot be impaired or extinguished during its existence by seizure under legal process on behalf of the buyer's creditors: 2 Mechem, Sales, § 1571; *Buckley v. Furniss*, 15 Wend. 137; *Chicago, etc. R. Co. v. Painter*, 15 Neb. 394 (19 N. W. 488).

4. Now, the goods in controversy were consigned by the sell-

ers to Olsen at Drewsey, a point 60 miles from Huntington. The plaintiff is engaged in the warehouse and forwarding business at Huntington. He had authority from Olsen to receive from the railroad company all goods consigned to him, and forward them to their destination when ordered to do so. He could not change the destination of the goods, nor make any disposition of them except to forward them to Drewsey. He was, therefore, a mere forwarding agent, and the goods were in transit while in his possession, and subject to the right of the seller to take possession thereof on the consignee becoming insolvent: Hutchinson, Carriers (2 ed.), § 416; Newmark, Sales, § 414; 2 Mechem, Sales, § 1547. The transit of the goods had, therefore not terminated at the time the consignors demanded the return thereof and the instructions upon that question were pertinent.

5. Nor was it necessary for the plaintiff to aver that the goods had been stopped *in transitu* by the vendors to entitle him to prove that fact, and the court to instruct the jury in reference thereto. The defendants set up as a defense that the goods were the property of Olsen, and had been attached as such. To overcome this defense it was competent for the plaintiff to show that the goods had never been delivered to Olsen, but were still in transit at the time the defendants wrongfully obtained possession thereof, and that subsequently the sellers had exercised the right given by law to cancel and annul the sale and thereby terminate any rights secured by the defendants under their attachment.

It follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Decided 21 August, 1906.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE BEAN delivered the opinion.

6. A contention is made that there was no evidence of the exercise by Palm, Whitman & Co. and Meyer, Mish & Co. of the right of stoppage *in transitu*, but that in demanding possession from the plaintiff of the goods sold by them to Olsen, they acted upon a rescission of the sale, and not upon the right

given them by law to stop the goods in transit because of Olsen's insolvency. The complaint alleges, and the evidence tended to show, that upon Olsen's failure he requested Palm, Whitman & Co. and Meyer, Mish & Co. to take back the goods purchased from them, and authorized and directed them to demand a return thereof from the plaintiff, and that in pursuance of such authority and information they demanded the possession. This was, we think, evidence of the exercise of the right of stoppage *in transitu*. No particular method of exercising this right is required. The material and important thing is to inform the carrier or person in possession of the goods before their delivery to the consignee that the seller directs the further transit of the goods to cease. The reason or impulse which instigates the act is not important: 2 Mechem, Sales, § 1605. There was nothing in the action or conduct of the firms referred to to indicate that they claimed possession of the goods by reason of a rescission of the contract of sale, and did not rely upon the right of stoppage *in transitu*. The petition is denied.

AFFIRMED: REHEARING DENIED.

Decided 24 July, 1906.

BROWN v. GOLD COIN MINING CO.

86 Pac. 361.

WATERS—EVIDENCE AS TO CAUSE OF POLLUTION.

1. The evidence justifies the finding of the trial court that the injury to plaintiff's land complained of was caused by his having closed the gate in his dam or by permitting it to remain closed at a time when he did not need the water of Rith Creek for irrigation.

WATERS—INJUNCTION AGAINST POLLUTION BY MINING DEBRIS.

2. Where, by reason of the insufficiency of defendant's dam, the dumping of tailings from defendant's quartzmill into the stream by which plaintiff's farm was irrigated during the irrigation season will practically destroy the farm, plaintiff is entitled to enjoin defendant either from operating its mill during the irrigation season or from permitting the tailings during that period to flow down the channel of the stream.

WATERS—EQUITABLE ESTOPPEL BY TACIT ACQUIESCENCE.

3. That plaintiff was employed by defendant about its quartzmill, and knew it was being constructed to reduce ores, and made no immediate objection to defendant's plan for the dumping of tailings into a stream by which plaintiff's farm was irrigated, is not sufficient to constitute an equitable estoppel, precluding plaintiff from thereafter maintaining a suit to restrain such deposit, as the relation of master and servant does not

constitute such a joint participation in a joint enterprise as to support an estoppel.

RIGHT OF RIPARIAN PROPRIETOR TO FLOW OF STREAM.

4. A riparian proprietor on a stream is entitled to have it flow in its accustomed location unimpaired in quality and undiminished in quantity, except by the reasonable use of other like proprietors.

For example: A prior settler and riparian owner on a stream is not obliged to give up the use of such stream for domestic and stock purposes in favor of a subsequent mining plant further up the stream, because he can procure water elsewhere on his premises, but he is entitled to restrain the pollution of the stream as it flows.

APPEAL—DISCRETION AS TO COSTS IN EQUITY.

5. The supreme court may adjust the costs and disbursements in an equity case as it may deem proper, under Section 566, B. & C. Comp. as, by assessing the charges of both trial and appeal against the losing party.

From Baker: SAMUEL WHITE, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by A. P. Brown against the Gold Coin Mining Company, a private corporation, to enjoin the pollution of the water of a stream and from interfering with the flow thereof. The plaintiff is the owner of the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 22 in township 12 S., of range 43 E. of the Willamette Meridian, which is arid land. Rith Creek, a nonnavigable stream, flows easterly and forms, in the south 40 acres of such land, a confluence with Shirt Tail Creek, which latter stream flows northeasterly and empties into Burnt River. These creeks have a fall of about one foot to the rod, their banks are from three to four feet deep, and each stream affords about the same quantity of water which generally ceases to flow in August of each year. The plaintiff's predecessor in interest settled on this land and, about 1886, constructed a ditch on the north side of Rith Creek and another on the opposite side whereby he made a prior appropriation of all the water thereof during the irrigating season, which quantity has ever since been used in raising crops on the land described. On the east side of Shirt Tail Creek, below the mouth of Rith Creek are located the plaintiff's house and barn in the order named. The defendant owns several mining claims on Rith Creek and in 1905 built above plaintiff's premises a quartz mill which it completed November 5th of that year and operated for 18 days in pulverizing ore, during which time tailings were carried down

the channel of the creek to plaintiff's land, filling his north ditch and depositing a sediment on about four acres of his alfalfa meadow. The complaint states the facts hereinbefore detailed and alleges that the defendant unlawfully diverted and polluted the water of Rith Creek, rendering it unfit for household and domestic uses, compelling plaintiff to carry water a great distance for such purposes and to drive his cattle elsewhere to quench their thirst, and that defendant's agents threaten to continue such trespass and nuisance and, unless restrained, will do so to plaintiff's irreparable injury.

The answer denies the material allegations of the complaint and avers that the mill was constructed with plaintiff's knowledge and consent, in relying upon which a large sum of money was expended whereby he ought now to be estopped to claim the right asserted; that defendant erected and maintained a safe dam which prevented tailings from its mill from flowing to plaintiff's premises; that there are two or more springs on his land furnishing sufficient water for domestic and stock purposes and that he has never used the water of Rith Creek therefor; that the quartz mill was not started until the irrigating season had closed and the channel of the stream was opened, but plaintiff for the purpose of commencing this suit, purposely closed the headgate of his dam, thereby flooding his land and causing the sediment to deposit thereon. The reply put in issue the allegations of new matter in the answer, and, the cause being tried, the suit was dismissed, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the name of *Hart & Smith*, with an oral argument by *Mr. Julius Newton Hart*.

For respondent there was a brief over the name of *John Langdon Rand*, with oral arguments by *Mr. Rand* and *Mr. James Henry Raley*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. The testimony given at the trial shows that the defendant in excavating three terraces on a side hill for the foundations of its mill, placed the rocks and earth so removed in the bed

of Rith Creek, intending to form a dam to retain the tailings. H. J. Stillman, who constructed the dam, testifying as to its dimensions, says it was about 50 feet long, extending across the creek, 30 feet wide, and 8 or 10 feet high and backed the water about 100 feet. The boughs of some trees were used in making the dam, and referring thereto the witness, C. M. Foster, a civil engineer, was asked this question:

"How much brush or other obstructions did you find in the channel of Rith Creek at or near the defendant's quartz mill?"

He replied:

"Well, there were one or two armfuls. I think a man could take the brush up in his arms. The brush was lying across the creek and the water running under. I would not say whether it had been placed there purposely or not."

T. H. White, the president of the defendant corporation, as its witness, testified that the brush used in the dam could not be seen except at the top of the embankment, and describing the obstruction to the flow of water and the material of which it was composed, he said:

"The main dam consists of large boulders taken from the excavation and brush that was torn down and taken away from the excavation and thrown into the bed of the creek, together with the dumping of the material taken from the excavation; so the body of the dam, the slum dam, consists of brush and cottonwood trees taken near by, cut down and placed across the stream to prevent tailings from going down the creek.

Q. About how many armfuls or cords of such brush or trees was used in the construction of the slum dam?

A. It would only be an estimate. The exact amount I do not know for the man who did it, done it when I was not there. I wasn't there all of the time.

Q. Did you see it after it was done and before the mill was run?

A. I did.

Q. What would be your estimate of the number of cords used in the construction of this?

A. Perhaps one half a cord of brush of cotton wood trees.

Q. And with that placed where, with reference to the main dam?

A. At the upper end of the main dam, and directly across the stream."

C. B. Johnson, as defendant's witness, stated that the dam referred to was constructed of timbers 12 by 12 inches square, of various lengths, logs and planks, but as his testimony in respect to such lumber is uncorroborated by that of any other witness, we think the declarations under oath of Stillman and of White as to the material of which the dam was made, are entitled to more respect. The testimony of Johnson must therefore be disregarded, for he evidently had some other dam in mind.

The testimony further shows that when this cause was tried in December, 1905, the water of Rith Creek had cut out one end of the dam at the mill so that no pond remained, thus demonstrating the faulty construction of the dam, which defect is clearly evidenced by the testimony of White and justifies the court's finding that the dam was not sufficient properly to impound the tailings from the mill, a part of which escaped and was carried down the creek to the head of plaintiff's ditch. It will be remembered that the defendant began operating its mill November 5, 1905. At that time the ground in the vicinity of Rith Creek was frozen. Several witnesses who have had experience in irrigating arid lands in that part of the State, testified that the artificial application of water at such a time to an alfalfa meadow is detrimental to the crop. The plaintiff maintains in Rith Creek a dam having a head gate which when closed raises the water and forces it into his lower or north ditch. When this gate is open and the volume of water is sufficient, the deep banks of the creek and its fall give the current such a velocity that it carries all tailings placed in the stream into Shirt Tail Creek and thence into Burnt River. The plaintiff, as a witness in his own behalf, testified that this head gate had not been opened since May, 1905, and was not raised while the defendant operated its mill, during which time his north ditch, for about 300 yards from its head, was filled with tailings, and sediment was deposited on about four acres of his alfalfa meadow. His testimony in respect to the condition of the head gate is questioned by the declaration of several witnesses who say that a slimy deposit was seen on the banks of

the creek immediately below his dam, which stain would not have been in evidence if the gate had been closed all the time, and also by showing that mud had been banked up against the head gate to prevent any leaks therein, thus showing an effort on the part of some one to magnify the injury which forms the basis of equitable intervention in this suit. Whether or not the head gate was open when the mill was started and was shut while the defendant was pulverizing ore or remained closed all the time the machinery was operated, we do not think it important to consider, for the plaintiff, having no use for the water to irrigate his alfalfa when the ground was frozen, should have raised the gate, if it was closed as he maintains. T. D. Moffat, as defendant's witness, testified that while the mill was in operation he, with E. D. Murphy, met the plaintiff, who, referring to the defendant's agents, said "I am irrigating now for their benefit," which declaration is corroborated by the testimony of Murphy. The plaintiff denies the statement thus imputed to him, but his testimony must be taken with some misgivings for 11 witnesses say that his reputation for truth and veracity is bad. Other witnesses called by the plaintiff say that his reputation in this respect is either good or that they never heard it questioned. We think the testimony justifies the court's finding that the injury complained of by the plaintiff on account of the tailings deposited in his ditches and on his meadow was caused by his closing the head gate of the dam or by permitting it to remain closed at a time when he did not need the water for irrigation.

2. The court based its decree dismissing the suit on the ground that the plaintiff contributed to the injury of which he complains by shutting down the head gate of his dam or by permitting it to remain closed when he had no occasion to use the water of Rith Creek. It should be assumed that the operation of the defendant's mill will be continued until the valuable quartz in its mines has been removed and the ore extracted therefrom, and that such work will probably be pursued until it ceases to be profitable. This being so, the dumping of tailings in the creek, during the irrigating season, with no more pro-

tection against injury therefrom than the defendant's dam affords, will practically destroy plaintiff's farm, so that, based on the fact found by the court as to the insufficiency of that dam properly to retain tailings, the conclusion of law deducible therefrom should have been a decree enjoining the defendant from operating its mill in the irrigating season, or from permitting the tailings, during that period of the year, to flow down the channel of the creek, thus compelling the defendant to erect and maintain a sufficient dam: *Carson v. Hayes*, 39 Or. 97 (65 Pac. 814); *York v. Davidson*, 39 Or. 81 (65 Pac. 819).

3. The cause being tried in this court anew, such a decree should now be rendered, unless the plaintiff by his conduct, is estopped to assert his prior right of appropriation of the waters of Rith Creek. T. H. White testified that in March, 1905, while he and his associates were developing the mining claims on Rith Creek with a view of buying them, he met the plaintiff, who expressed the wish that the value of the property might justify the building of a quartz mill thereon. As a basis for the equitable estoppel relied upon we quote from White's testimony as follows:

"During my conversation with Mr. Brown I asked him, in the event our company should erect a mill above his place, if he would object to the muddy water or tailings or debris that might come from such place. Mr. Brown replied that he would not; that it would be beneficial to him for the reason that his ground lying on a hillside, and quite a grade under his ditches, it being of a loose decomposed formation, the water as it was used, or as he had used it, cut away and made trenches which exposed the roots of his alfalfa, and that if there was a mill above his place that the sediment, slimes and tailings would be beneficial to his land; would also be beneficial to his ditches, they would aid the water in flowing through the ditches, bottling the bottoms of them, making them tighter so that they would carry water further, and that the muddy water, sediment and slime deposited upon his lands would seal the pores of the land and hold the loam or surface from being cut by the action of the water, and would thereby be beneficial."

White also testified, in effect, that he explained to his associates the plaintiff's representations in respect to the waiver of his rights and that, relying thereon, the defendant corporation

paid \$15,000 for the mining claims and expended the further sum of \$17,000 in erecting the mill. The plaintiff denies that he made such representations, but, as his reputation for truth is challenged as hereinbefore indicated, it must be assumed that the evidence on this branch of the case preponderates in favor of the defendant.

The evidence shows that the plaintiff was employed by the defendant about its mill; that he knew it was being constructed to reduce ores and made no objection to the erection thereof. Such tacit acquiescence, however, is not sufficient to create an equitable estoppel: *Lavery v. Arnold*, 36 Or. 84 (57 Pac. 906, 58 Pac. 524); *Hallock v. Suitor*, 37 Or. 9 (60 Pac. 384); *Ewing v. Rhea*, 37 Or. 583 (62 Pac. 790, 52 L. R. A. 140, 82 Am. St. Rep. 783); *Bolter v. Garrett*, 44 Or. 304 (75 Pac. 142). To produce such an impediment, the evidence must conclusively show that money has been expended or labor performed in making pursuant to an agreement of the parties, in relation to the exercise of some right over or easement in the lands of another, or some joint participation of the parties in the enterprise from which a license to do the particular act relied upon may reasonably be inferred: *Garrett v. Bishop*, 27 Or. 349 (41 Pac. 10); *North Powder M. Co. v. Coughanour*, 34 Or. 9 (54 Pac. 223); *McPhee v. Kelsey*, 44 Or. 193 (74 Pac. 401, 75 Pac. 713.) The relation of master and servant does not constitute the joint participation in a common enterprise that is necessary to raise an estoppel by conduct, to create which the party against whom the legal bar is asserted must have taken an active part in the adventure, in consideration of the anticipated benefits which he expected would accrue to him from the completion of the undertaking. The plaintiff's employment by the defendant was, therefore, insufficient to bind him in any manner by his silence. The advantages that the plaintiff contemplated would be derived by the puddling of his ditches with sediment, so as to make them safe conduits of water, furnished an adequate consideration for the parol license which, by express agreement, he granted. Such privilege must have been founded on the hypothesis that the tailings from defendant's mill would

be retained in a safe impounding dam until the greater part of the slums had been precipitated, when the water, though somewhat muddy, could be liberated and would flow to the head of plaintiff's ditches and thence upon his lands, and there used without injury in irrigating his crops. The testimony shows that this method of operating a slum dam can be pursued without serious detriment to persons who use the water of a stream for irrigation below the artificial pond where tailings are held. The dirt, rocks and brush which the defendant dumped into the bed of the creek did not constitute such a dam as the plaintiff might reasonably have expected would be constructed.

4. The testimony of plaintiff's witnesses is to the effect that the water which he has heretofore required for household purposes and for his stock has been obtained from Shirt Tail Creek below the mouth of Rith Creek, and that the tailings from the defendant's mill so polluted the former stream as to render the water thereof impure and to compel him to secure it for the purposes indicated at other places, thereby damaging him. The plaintiff was asked this question:

"Prior to defendant's operations, where and how did you get the water that you used for household purposes?"

He replied:

"Got it out of the creek below the house about 40 feet; took it out of the creek; dipped it up out of the creek."

This witness further testified that there were times when he obtained water from other sources but when winter approached he was obliged to secure it from Shirt Tail Creek for household purposes and for his stock; that after the defendant began operating its mill, he dug a hole in the bank of the creek, about 150 feet from his house, and got seepage water from the muddy current of the stream that was not fit to drink; and that he was compelled to drive his stock 150 yards to water when prior thereto they had secured it in the barnyard without attention.

As an inference tending to disprove the plaintiff's declaration upon oath that he procured water for domestic purposes from Shirt Tail Creek, the evidence discloses that he had a hog pen

in the bed of Rith Creek just above its confluence with that stream. He admits on rebuttal that he had such a sty at the place indicated, but testifies that it had not been used for the purpose for which it was made since the previous winter, his hogs having been kept out of the inclosure so that he might use the water. The court alluded to such pen and found that on plaintiff's premises water could be secured from other sources which was not contaminated by the defendant's mill and which he could use for household and stock purposes. The testimony of plaintiff's witnesses is to the effect that in 1905 the creeks dried up in July, which was uncommon; that a spring rises in the bed of Rith Creek near its mouth that affords some water in the dry season; that the creeks rose before water could be secured from other sources and that from the operation of the defendant's mill the water in the creeks became so muddy that plaintiff's stock would not drink it.

The plaintiff, being a riparian proprietor on Rith Creek, was entitled to have that stream flow through his premises undiminished in quantity, except as to the reasonable use thereof by other like proprietors, and unimpaired in quality, and because he might possibly secure water for his family and for his stock at other places on his land than the streams mentioned, does not impose on him the duty of resorting thereto to supply his needs, in order that a quartz mill may be operated. Mining is a legitimate industry, and as the securing of precious metals conduces to the general wealth of the country, every reasonable rule of law should be invoked and applied to foster the enterprise. Farming in the arid region is as much entitled to protection as any other business. These and other like employments requiring the use of water from nonnavigable streams should be simultaneously conducted if possible. Where, however, a priority exists in the use of water, the party who makes a subsequent appropriation for any purpose inconsistent therewith must yield to the party possessing the superior right. The evidence shows that the material pulverized by the defendant's mill consists of quartz and decomposed granite, the reduction of which by stamps produces a fine clean sand that would not seriously

deteriorate the quality of the water of the stream into which it was deposited. A text-writer, commenting upon the character of such substance, says: "The tailings from an ordinary quartz mill, when discharged into the running streams, have no greater tendency to deteriorate the quality of the water than the material washed from the natural banks. As a physical impediment they are comparatively harmless. They are fine particles of sand artificially produced, but of the same character as that washed into the streams from the rocks eroded by processes of nature which are universal": 2 Lindley, Mines (2 ed.), p. 1527.

Believing that the quartz and granite can be pulverized and the tailings impounded by the construction and maintenance of a proper dam, the decree of the lower court will be reversed, and one entered here perpetually restraining the defendant, its agents and servants, from the further operation of its mill until it has made suitable provision to prevent injury to plaintiff's irrigating ditches, and to the water used by him from the creeks for household and for stock purposes.

5. The plaintiff may recover his costs and disbursements in this court and in the court below. REVERSED.

Decided 24 July, 1906.

JENNINGS v. OREGON LAND CO.

86 Pac. 367.

VENDOR AND PURCHASER—MEASURE OF DAMAGES FOR BREACH BY VENDOR OF CONTRACT TO CONVEY.

1. The measure of damages for a refusal by a vendor to convey under his contract is the value of the property at the time of the breach, less liens which the purchaser has allowed to accrue thereon.

For instance: A land owner agreed to convey several lots to a hotel manager, in consideration of having a hotel erected thereon within a stated time. This was done though several liens were in force against it, but the owner refused to convey. In an action of damages for such refusal the measure of recovery is the value of the land with its improvements at the date of the breach, less the sum of the accrued liens, and not the land plus the cost of the labor and material.

DAMAGES FOR REFUSAL TO CONVEY—COMPETENCY OF EVIDENCE.

2. In order to enable a jury to estimate the value of a building that has no market value, owing to its location and size, and to test the

value of opinion evidence on the subject, it is competent to present to the jury the items and expense of construction.

HARMLESS ERROR—EXCLUSION OF EVIDENCE—SUBSEQUENT ADMISSION.

3. In an action for breach of a contract the sustaining of objections to questions to witnesses as to whether there was any prior contract between the parties was not injurious to the party propounding the questions, where it appeared that witnesses were subsequently permitted to testify to all the circumstances surrounding the contract and the negotiations between the parties.

ESTOPPEL BY ADMISSION.

4. In an action for damages for breach of defendant's agreement to convey land to plaintiff, the complaint having alleged a demand and refusal, and the answer not having denied the allegation, and having admitted that plaintiff had demanded a conveyance, defendant could not on trial question the sufficiency of plaintiff's demand.

From Morrow: WILLIAM R. ELLIS, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by Sarah C. Jennings and her husband against the Oregon Land & Water Co. to recover damages for the breach of a contract for the sale of real estate. On June 27, 1904, the defendant corporation, through its superintendent and manager, F. B. Holbrook, made and entered into the following contract with the plaintiff Sarah C. Jennings:

"Irrigon, Oregon, June 27, 1904.

This Agreement, made and entered into the day and year above written, between F. B. Holbrook, superintendent, party of the first part, and Sarah Jennings, party of the second part, Witnesseth:

That the Party of the First Part Hereby Agrees to convey to the party of the second part all the following described property, to wit: Lots 1, 2, 3, 4, and 5, block 37, and lots 25, 21, 22, 23, and 24, block 36, Irrigon, Oregon—in fee simple and free of incumbrances;

And the Party of the Second Part Hereby Agrees, in consideration of the conveyance to them of the said property as above described, to erect on lots in block 37 a hotel building, fifty by eighty (50x80) feet, two stories high, as per plans and specifications furnished the Wind River Lumber Company for material for same, and that work on said building shall commence not later than sixty days from date and be completed not later than twelve months from date.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and year above written.

Witness: Geo. Jennings.

F. B. Holbrook, Supt.
Sarah C. Jennings."

The complaint alleges that within 60 days after the making of the contract Mrs. Jennings commenced the construction of the building as agreed upon, and fully completed the same according to plans and specifications before the expiration of the time stipulated; that thereafter she demanded of defendant a deed for the real property described in the contract, and that it failed and neglected to make the same and repudiated the contract, declaring that it never would convey such real estate to her; that the real property, with the building thereon, was at the time of the breach by defendant of the reasonable value of \$8,000; and that plaintiff is damaged in such sum—and prays judgment accordingly. The answer admits the execution of the contract as alleged, the demand by plaintiff for a conveyance of the property, and the defendant's refusal to make the same, but denies generally all the other allegations of the complaint. For an affirmative defense it is alleged that the sole consideration for the agreement was the construction and maintenance by Mrs. Jennings of a first-class hotel on the property agreed to be conveyed to her, and that she had failed and neglected to comply with her contract, and had suffered liens and incumbrances to be placed on the property in excess of its value. The reply denied generally all the allegations of the answer. Upon the issues thus joined the cause was tried to a jury, and a verdict returned in favor of the plaintiff for \$3,200. From a judgment entered thereon the defendant appeals. **AFFIRMED.**

For appellant there was a brief over the names of *J. Thorburn Ross, William Ambrose Munly, John K. Kollock and Redfield & Van Vactor*, with an oral argument by *Mr. Munly*.

For respondents there was a brief over the names of *Ben F. Tweedy and C. E. Woodson*, with an oral argument by *Mr. Woodson*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The first assignment of error is the admission in evidence of the testimony of W. S. Jennings, giving the names of a portion or all the workmen employed in the construction of the building, the number of days each was employed, and the value (48th Or.—19)

of his services. Jennings was the architect who prepared the plans and specifications and was foreman of the work. He testified that the building was completed according to plans and specifications and was reasonably worth \$6,000. He described its character, the size and number of the rooms, the size and character of the materials, and said he did not know whether he had the names of all the people who worked on it or not, but, over an objection and exception of the defendant, was permitted to give the names of such as he could recall, and the number of days each worked, and the value of his services. The objection to this testimony is that the measure of damages for a breach of the contract by defendant is the value of the property at the time of the breach, less the liens which had been allowed by plaintiff to accrue thereon, and not the cost of the labor and materials which entered into the building: *Neppach v. Oregon & Cal. R. Co.* 46 Or. 374 (80 Pac. 482). This rule is undisputed, and was adhered to by the court throughout the trial and in its instructions to the jury.

2. The testimony in question was not offered or admitted as proof of the value of the building, or of itself determinative of the measure of damages. It was admitted for whatever the jury might consider it worth in arriving at a proper estimate of the value of the building in connection with the other evidence on the subject. For this purpose it was, we think, competent: 16 Cyc. 1133; *Markowitz v. Kansas City*, 125 Mo. 485 (28 S. W. 642, 46 Am. St. Rep. 498). The building was a large structure 50 by 80 feet in size, two stories high, erected in an embryo town of 200 or 300 inhabitants. It was the largest building in the place, practically in a class by itself, and had no market value. Testimony as to its cost was, therefore, proper, not as of itself proof of value, but to aid the jury to arrive at an accurate conclusion in the matter, and to enable them to test the worth of the opinion evidence on that subject: *Patterson v. Kingsland*, 8 Blatchf. 278 (Fed. Cas. No. 10,827); *Richmond v. D. & S. R. Co.* 40 Iowa, 264; *Faust v. Hosford*, 119 Iowa, 97 (93 N. W. 58); *Memphis v. Kimborough*, 12 Heisk. 133.

3. The next assignment of error is based upon the refusal

of the court to permit Holbrook, a witness for the defendant, to answer a question as to whether there was any prior contract between Mrs. Jennings and the defendant entered into as an inducement to the execution of the contract sued on, and the refusal to permit Roderock, another witness for the defendant, to answer the question, "Will you state the circumstances surrounding the execution of this contract at the time of its execution, in so far as you know them of your own knowledge?" It does not appear from the bill of exceptions what facts defendant expected to elicit by these questions, nor do the answers desired appear from the form of the question. It is therefore doubtful whether, under the rule announced in *Kelley v. Highfield*, 15 Or. 277 (14 Pac. 744), and since followed by this court, the exception presents any question for review. But, however that may be, the position of the defendant seems to be that the specifications referred to in the contract were simply a bill of lumber and material furnished a mill company, and it therefore had a right to show by the witnesses the kind and character of the building plaintiff promised to construct. Accompanying the record and referred to in the bill of exceptions as an exhibit is a transcript of all the testimony in the case. It appears therefrom that the objections made to these questions and the rulings of the court thereon went to their form, rather than to their substance, and that the witnesses were in fact permitted to testify at length without objection as to all the circumstances surrounding the execution of the contract and the negotiations between the parties. The ruling of the court complained of could not, therefore, have been injurious to defendant.

4. It is next contended that there was no sufficient demand for a conveyance made by the plaintiff prior to the commencement of the action. There was no issue upon that question. The complaint alleges a demand and refusal, and this averment is not traversed. Moreover, the answer expressly admits that "defendant has not delivered the deed of conveyance to the plaintiffs of the property described in the complaint and that plaintiffs had demanded a conveyance of the same." Having

made this unqualified admission of a demand and refusal, the defendant was not in a position to question the sufficiency thereof on the trial: 11 Am. & Eng. Encyc. Law (2 ed.), 447; *Smith's Estate*, 43 Or. 595 (73 Pac. 336, 75 Pac. 133).

There being no error in the record, the judgment is affirmed.

AFFIRMED.

Decided 31 July, 1906.

OLIVER v. SYNHORST.

86 Pac. 376.

LOSS OF STREETS BY NONUSER*—ESTOPPEL AGAINST CITY.

Although title to land dedicated as a street cannot be acquired against a city through lapse of time under a statute of limitations, still rights to even a street may become so fixed by neglect to open and use it, that it may be more just to enforce an equitable estoppel against the municipality than to retake the street.

For instance: A street having been dedicated but not opened over rough ground, whereby uncertainty existed as to the lines, and a purchaser in the tract having in good faith placed valuable improvements on part of the street adjoining his lots, which were undisturbed for thirteen years, and the removal of which would appreciably injure the lots, the city ought to be equitably estopped now from claiming that part of the street so improved.

From Union: **ROBERT EAKIN**, Judge.

Statement by **MR. JUSTICE BEAN**.

This is a suit by Anna Oliver against Fred Synhorst, as street

*NOTE.—In connection with this case see the following notes:

Rights Acquired as Against the Public by Adverse Possession of a Highway or City Street: 18 L. R. A. 146, 29 Am. St. Rep. 500. Extinguishment of Highways and Other Easements by Operation of the Statute of Limitations: 14 Am. St. Rep. 278; 76 Am. St. Rep. 492. The Right to Acquire Title by Adverse Possession to Lands Held by Municipal or Other Public Corporations and Devoted or Dedicated to a Public Use: 87 Am. St. Rep. 775-782.

As to the Effect of Adverse Possession of Public Property Other Than Streets or Roads, see 76 Am. St. Rep. 479.

Abandonment of a Highway by Non-User or Otherwise Than by the Act of Public Authorities: 26 L. R. A. 449; 14 Am. St. Rep. 281.

Discontinuance or Vacation of a Highway by the Acts of Public Authorities: 26 L. R. A. 821.

The Effect of an Abandonment of a Highway: 26 L. R. A. 659.

The Right to Acquire Title by Adverse Possession to Lands Held by Railway or Other Quasi Public Corporations: 87 Am. St. Rep. 775; 54 L. R. A. 522 (with briefs); 2 L. R. A. (N. S.) 272 (with briefs).

See, also, *Christian v. Eugene*, 49 Or. —.

REPORTER.

superintendent of La Grande, to enjoin him from removing or interfering with a fence and sidewalk of the plaintiff along the north side of lots 3, 4 and 5 in block 74 of Chaplin's Addition to La Grande, and from destroying or in any manner interfering with her shade trees, ornamental trees and shrubbery thereon. By the complaint, after the preliminary allegations, it is averred that on July 14, 1884, Daniel Chaplin and C. H. Prescott, trustee, filed in the office of the clerk of Union County and caused to be recorded a plat of Chaplin's Addition to the City of La Grande, upon which was shown a street running east and west along the north side of block 74 and designated as O Street, and the pleader then continues:

"But that the City of La Grande never accepted the donation of said O Street along the north side of said block 74, and said street at said point was closed and by nature impassable until five or six years ago when private individuals made a narrow grade or wagon track up the hill, along and some distance from the north side of said block 74, and the city exercised no right or control over said street until the fall of 1904, when the city council passed a pretended ordinance requiring a sidewalk to be built along the north side of said block 74.

"That in the fall of 1891 one T. D. Remington bought lots 4, 5 and 6 in said block 74, and built a fence around the same, and built a large house on said lot 5, and planted shade trees around said lots, and since said time this plaintiff and her grantors have had said premises inclosed continuously up to where her fence now stands on the north side of lots 4 and 5 on O Street, claiming in good faith to own the same and that the plaintiff is the owner thereof, without any objections from said City of La Grande, and with the knowledge and consent of said city, and about the year 1897 with the knowledge and consent of said City of La Grande this plaintiff at great cost constructed an iron fence along the north side of said lot 5 and along the north end of said lot 5 and along the north end of said lot 4 about 150 feet on said O Street in said City of La Grande, the same being along the same line where plaintiff's grantor constructed said fence in the fall of 1891; and, with the like knowledge and consent of said city, the plaintiff and her grantors hauled earth at great cost and filled in said lot from her said fence to her dwelling house, and improved said lot and ground and made a fine lawn thereon, and planted valuable shade and ornamental trees along said fence, and planted

and propagated a very fine rose garden within said inclosure and next to said fence and made improvements on her said dwelling house at great cost, all of which was done in good faith by this plaintiff and with the knowledge and consent of said City of La Grande many years ago, and without any objections from said city, the plaintiff believing them to be on her own land.

"That several years ago the plaintiff, being the owner of lot 3 in said block 74, the same being on a steep hillside, blasted out and excavated said lot at great expense and constructed a barn thereon and left sufficient room between the barn and the supposed north line of said lot for the convenient use and occupation of said barn, and so that hay and feed could be hauled along said barn and inside of the supposed north line of said lot for delivery in said barn, all of which was done with the full knowledge and consent of said City of La Grande, and without any objections being made by said city, and at great expense to this plaintiff.

"That in about the year 1897 this plaintiff, with the consent of said City of La Grande, and at considerable expense, constructed a substantial sidewalk along the north side of her said lots 4 and 5 and up against her said iron fence the entire length of said lots on what was supposed to be the south side of said O Street, and that said sidewalk is now there in good condition for use, and that subsequently she extended her said sidewalk along the north end of lot 3 and on the south side of O Street, and that the sidewalk so extended is now there in good condition for use as a sidewalk and that no part of said sidewalk is dangerous or in need of repairs.

"That said O Street of said City of La Grande, as platted by said Daniel Chaplin, runs east and west along the north side of plaintiff's said premises, and if any part thereof is inside of plaintiff's said fence such part has never been opened for public use, and has been inclosed and improved by the plaintiff and her grantors with the full knowledge and consent of said City of La Grande, and without any objections being made thereto, ever since the fall of 1891.

"That the said dwelling house of plaintiff is worth not less than \$3,000, and the north side of said dwelling house is within about 16 feet of said iron fence above set out, and the whole architectural effect of said dwelling house and premises would be destroyed if said fence were removed seven feet or any other distance south of its present location, and all of the improvements on said premises, including said dwelling house, were made by the plaintiff and her grantors with the full knowledge

of the City of La Grande; that she and her said grantors believed and claimed that the north line of said premises was where said iron fence is now located."

It is then alleged that on December 12, 1904, the defendant, as street superintendent, wrongfully and erroneously claiming that plaintiff's fence and sidewalk were seven feet in the street, notified her to remove the same, and that if she did not do so within 24 hours he was directed by the city to remove it; that if such fence and sidewalk are moved back to what is claimed by defendant to be the street line they would be wholly on plaintiff's property and six or seven feet south of her north line, and her shrubbery and shade trees would be destroyed to her irreparable damage and injury.

"That by reason of the facts above alleged, the defendant as street superintendent of said City of La Grande and his successors in office ought to be and they are estopped and precluded from claiming now or at any time, or proving or alleging that any of the lands included within the plaintiff's said fence are or ever were any part of said O Street, and from asserting or exercising any supposed right to remove the plaintiff's said iron fence or her sidewalk onto her said lands, or in any manner to remove either said fence or said sidewalk from where they are now located or to interfere with them, or either of them, in any way, or to open or widen said O street so as to include within said street any part of the lands which are inclosed within her said fence as aforesaid."

The relief demanded is an injunction restraining the defendant and his successors in office from interfering with the plaintiff's fence and sidewalk, shade trees, shrubbery, etc., and for a decree establishing her north line at the point where such fence is now located. The court below, on motion of defendant, struck out all that portion of the complaint which we have inclosed in quotation marks, and plaintiff declined to amend or plead further.

The defendant answered, setting up that plaintiff's fence and sidewalk were seven feet in the street and was an unlawful obstruction thereto, and that the defendant had been ordered by the city to remove such obstruction. These allegations were denied by the reply. When the case came on for trial the plaintiff declined to offer any testimony, and after hearing that

of the defendant, the court rendered a decree dismissing the complaint, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the name of *Ramsey & Oliver*, with an oral argument by *Mr. William Marion Ramsey*.

For respondent there was a brief over the names of *F. S. Ivanhoe* and *Charles H Finn*, with an oral argument by *Mr. Finn*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The evidence does not accompany the transcript, and the only question for our consideration is whether the court erred in striking out the matter pleaded in the complaint as an estoppel. From these averments it appears, in brief, that Chaplin's Addition to La Grande was laid out and platted in 1884, and O Street thereon dedicated to the public. The street, however, was never opened or improved by the city, and it never assumed authority or control over it until the fall of 1904. In 1891 the plaintiff's grantor bought lots 4, 5 and 6 in block 74, abutting on O Street, and, with the consent and knowledge of the city, built a fence along what he claimed and believed to be the north line of such property, erected a large dwelling house on lot 5 with reference to such supposed line, and planted shade trees and shrubbery and otherwise improved the property for a residence site, claiming in good faith to be the owner of the same. In 1897, after the plaintiff had purchased the property, she constructed an iron fence at the place where the former fence stood, and afterward hauled earth and filled up the lot to such fence, and otherwise improved the property by planting shade and ornamental trees along the fence, making a rose garden inside of the inclosure near the fence, building a sidewalk just outside the fence, and otherwise improving the property at great cost, all of which was done in good faith with the consent and knowledge of the city authorities and under the belief that she owned the property so inclosed. Several years before the commencement of this suit she blasted out and excavated a part of lot 3 at great cost and constructed a barn thereon, leaving sufficient room between it and the supposed street line for a drive-

way. The plaintiff's dwelling house is within 16 feet of the iron fence and the architectural effect thereof and the beauty and value of her home would be materially impaired if the fence is now removed, and her approach to her barn would be entirely cut off. The occupancy and improvement of the property as referred to was made by the plaintiff and her grantor under the belief that the true north line is where the iron fence is now located and with the knowledge and consent of the city authorities. It thus appears that for more than 13 years the plaintiff and her grantor have been in the open, exclusive and peaceable possession of the strip of land now in controversy, and that they have made, without objection from the city authorities, valuable and permanent improvements thereon in good faith, believing that they were the owners thereof. The question for decision is whether, by reason of these facts, the city is now estopped to assert that the true street line is other than where the plaintiff's fence is located.

There is irreconcilable conflict in the cases as to whether the right of the public to use land dedicated for a street or highway may be extinguished by nonuser or adverse possession, due to the laches, negligence or nonaction of municipal authorities. The weight of the adjudged cases seems to be that since such authorities have no right to sell, alienate or dispose of the highways, except as provided by law, the statute of limitations will not run against them, and such is the rule now in force in this State by a recent statute: Laws 1895, p. 57. The authorities on the question are so fully collated and commented upon in the notes to *Orr v. O'Brien*, 14 Am. St. Rep. 278, and *Northern Pac. Ry. Co. v. Ely*, 54 L. R. A. 526, 87 Am. St. Rep. 775, that a mere reference to them is all that is essential in this connection. But, while the rule may be that the ordinary statute of limitations as such cannot be set up to defeat the right of the public to the use of a street or highway, there may grow up, in consequence of the laches of the public authorities, private rights of more persuasive force in the particular case than that of the public, and if "acts are done by an adjoining proprietor which indicate that he is in good faith claiming as his own

that which is, in fact, a part of the highway, and is expending money on the faith of his claim, by adjusting his property to the highway as he supposes or claims it to be, the public will be estopped." *Hamilton v. State*, 106 Ind. 361 (7 N. E. 9); *Chicago, etc., Ry. Co. v. Joliet*, 79 Ill. 25; *County of Piatt v. Goodell*, 97 Ill. 84; *Baldwin v. Trimble*, 85 Md. 396 (37 Atl. 176, 36 L. R. A. 489); *Paine Lumber Co. v. Oshkosh*, 89 Wis. 449 (61 N. W. 1108). Although Mr. Dillon is unwilling to assent to the doctrine that as respects public rights municipal corporations are within the ordinary limitation statutes, he says: "It will, perhaps, be found that cases sometimes arise of such a character that justice requires that an equitable estoppel shall be asserted even against the public; but if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments," and that "there is no danger in recognizing the principle of an estoppel *in pais* as applicable to exceptional cases, since this leaves the courts to decide the question, not by the mere lapse of time, but upon all the circumstances of the cases to hold the public estopped or not, as right and justice may require": 2 Dillon, *Mun. Corp.* (4 ed.), § 675.

This principle was applied by this court in *Schooling v. Harrisburg*, 42 Or. 494 (71 Pac. 605). May and Nixon had laid out an addition to the town of Harrisburg and duly acknowledged and recorded a plat thereof in 1871. At that time the tract of land was inclosed with a fence which was thereafter maintained. None of the streets or alleys shown were opened except a portion of one street, although the proprietors sold lots with reference to the plat. Notwithstanding the making and recording of the plat dedicating the streets and alleys to the public, Nixon continued to occupy and cultivate one of the streets and subsequently sold the lots abutting thereon and conveyed his interest in the street. His grantee occupied and cultivated the street and erected a shed to his barn extending out over an alley. It was held that upon these facts the municipal authorities were estopped from opening the street because of their laches in permitting Nixon and his grantee to improve

the same as a part of their premises. This case is decisive of the one at bar. Indeed, the facts call more strongly in the present case for the application of the doctrine of equitable estoppel than in the Schooling case. In that case Nixon and his grantee knew that the land occupied by them had been dedicated to the public and acted with full knowledge of that fact. Here, on the contrary, the plaintiff and her grantor supposed and believed that the portion of the street occupied by them was a part of their property and was included within the boundaries of their lots. Again, in the Schooling case the opening of the street would not have seriously injured the plaintiff, while here the removal of the fence to what the defendant claims to be the true street line would, according to the allegations of the complaint, practically destroy the plaintiff's property for residence purposes and would work irreparable injury to her. She has, with the knowledge and consent of the city authorities, inclosed a part of the street and improved the same in good faith to such an extent that (if the allegations of the complaint are true) she would be seriously injured and damaged if she is now required to remove her fence and throw open that portion of the street occupied by her to the public, and is therefore entitled to invoke, as against the city, the doctrine of estoppel. The decree of the court below will be reversed, and the cause remanded, with directions to overrule the motion to strike out, and for such further proceedings as may be right and proper.

REVERSED.

Decided 31 July, 1906.

KANE v. LITTLEFIELD.

86 Pac. 544.

WATERS—MINING DEBRIS—DAM AS NUISANCE—INJUNCTION.

1. Where a dam erected by a lower riparian proprietor backs water and mining debris onto the ground of an upper proprietor, who possesses the superior right to the use of the water, and prevents the debris discharged into the stream by the upper proprietor from being carried away, thereby interfering with the operation of the mine, the upper proprietor is entitled to have the maintenance of the dam enjoined as a private nuisance.

COSTS AND DISBURSEMENTS IN EQUITY—APPEAL.

2. Under the discretion confided to the court by Section 566, B. & C. Comp., the costs and disbursements of the trial court may be assessed against one party and the expenses of the appeal against the other party.

From Baker: SAMUEL WHITE, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by Bridget Kane against David Littlefield and Fred Cole to enjoin interference with dams built across a non-navigable stream to divert water for irrigation. The complaint alleges that plaintiff is the owner of 160 acres of arid land in Baker County, particularly describing the premises, through which Blue Canyon Creek flows; that she built two dams in that stream, and by means of ditches diverted water therefrom which has been used for 10 years in irrigating crops grown on her land; that April 10, 1904, the defendants unlawfully destroyed these dams thereby preventing the water from flowing in the ditches to her premises, to her irreparable injury, and threaten to remove any dams that she may place in the creek, which menace they will execute unless restrained.

The answer denies the material allegations of the complaint and avers, in effect, that since 1864, the defendants and their predecessors in interest have been the owners and in the possession of 90 acres of patented placer mining ground joining plaintiff's land, and also of 60 acres of similar unpatented land adjacent to their mines, the working of which requires the use of a great quantity of water to extract the valuable ore which the premises contain; that in the year stated, the defendants' grantors and predecessors in interest appropriated all the water of the creek mentioned, and of its tributaries, which quantity they have ever since continuously used for mining purposes, and that such privilege is prior in time and superior in right to plaintiff's claim thereto; that the defendants' grantors constructed a tailrace from a point above such mines through the premises now owned by plaintiff to Powder River, which conduit has for more than 30 years been uninterruptedly used, except as hereinafter stated, for dumping tailings therein, to be conducted across her land, whereby a perpetual right has been

secured to continue to place debris in such race; that the plaintiff and her agents, within the last two years, have without right, built dams in such race, thereby obstructing the flow of water therein, and causing the debris to back upon defendants' mining ground to their irreparable injury, and that, in consequence of such unlawful acts, they were compelled to remove the dams, so that the tailings from their mines might be carried off, which abatement constitutes the injury of which the plaintiff complains. The reply having denied the allegations of new matter in the answer, the cause was tried, resulting in a decree as prayed for in the complaint, and the defendants appeal.

MODIFIED.

For appellants there was a brief over the name of *Olmstead & Strayer*, with an oral argument by *Mr. Martin Luther Olmstead*.

For respondent there was a brief and an oral argument by *Mr. John Langdon Rand*.

MR. JUSTICE MOORE delivered the opinion of the court.

The testimony shows that Blue Canyon Creek enters plaintiff's land near the northwest corner, flows southeasterly and empties into Powder River. About 1880 the Marysville Mining Co., being the owner of certain placer mining ground situated on the creek above and joining the premises now owned by plaintiff, straightened and deepened the channel of that stream from its mouth to a point above such mines. This water course was improved, so as to drain the mining ground to the bed rock, and also to carry off the tailings produced by hydraulic mining. The channel was, in some places, dug 25 feet deep, while in other parts of the conduit a flume was constructed so as to give to the water flowing in the race sufficient velocity to take away the debris placed therein. The enterprise not proving profitable the patented mining ground and the water right appurtenant thereto were sold by the company making the improvement and such property has by mesne conveyances, as we understand, become vested in the defendants who are in possession of other unpatented mining claims situated on the creek above the mining ground for which they have a legal title.

In consequence of the failure to find gold in paying quantities in Blue Canyon, the flume has been allowed to decay and the race to fill with tailings, though some placer mines have been constantly operated on the creek by using the water thereof, the debris being carried down that stream. In the early spring, when the snow is melting in the mountains, Blue Canyon Creek and its tributaries afford about 2,500 inches of water, miners' measurement, and the current is so swift that most of the tailings deposited in the stream are carried into Powder River. In the later summer, however, the water generally ceases to flow in the creek and does not again become copious until the rainy season sets in.

The plaintiff's predecessor in interest used water to raise crops on the land now owned by her and she, in 1896, caused a dam to be built in the creek, 16 rods below the line where it enters her premises, and also constructed another dam 100 rods below the first, and by means of ditches diverted water which she used in irrigating crops, raising hay on about 100 acres of her land. The defendants having given notice to her of their intention to abate what they considered to be a private nuisance, removed her dams April 10, 1904. At that time they were mining on the side of a hill a mile and a quarter above the western border of her land. The place where they were then working is elevated about 100 feet above the top of her upper dam, so that it was impossible, with such obstruction to the flow of the water, to injure in any manner the operation of their mines at that place, and no immediate necessity existed for the removal of the dams. C. M. Foster, a mining engineer, as plaintiff's witness, testified that the grade of the creek from the western boundary of her land to the top of her upper dam is six feet, but that it would be impossible for the defendants to work their patented ground next to her premises, except by opening a race to carry off the tailings, and that if such dam were maintained, it would back the slums and debris on their land along the creek the distance of a quarter of a mile. The reconstruction of the lower dam, however, would not affect the defendants' mining ground in any manner, for the tailings

would be carried over the dam before the back water reached the defendants' premises. This witness says that the flume has been abandoned a great many years, but the right to the race has never been relinquished, and that every person mining on Blue Canyon Creek has used it to carry off tailings, though it has been filling therewith, and never cleared out to the bottom. Foster further testified that there had never been any mining done just above plaintiff's premises because at that place it was found that the ground did not contain sufficient gold to permit it to be worked profitably. O. N. Haskill, as defendants' witness, testified that the restoration of plaintiff's dams would prevent the defendants from mining their low ground for a mile immediately above her premises. The testimony of this witness is corroborated by that of Adam Christy. We think the testimony of Foster, who is an expert engineer, is entitled to greater credence, and conclude that the upper dam will not back the water farther than he states.

1. In *Turner v. Locy*, 37 Or. 158 (61 Pac. 342), it was held that a dam across a nonnavigable stream, whereby debris from the mine of an upper proprietor was arrested, does not constitute a private nuisance, authorizing an abatement thereof, unless the dam backs the water upon his premises, causing such an injury as to enable him to maintain an action for the damages sustained. The converse of this rule must necessarily be true, by the application of which it follows that when the dam of a lower riparian proprietor backs the water and debris upon the mining ground of an upper proprietor, who possesses the superior right to the use of the water, preventing him from operating his mines, equity will intervene to protect the interests of the latter. In the case at bar it is possible that the defendants' mining ground joining the plaintiff's premises contains such a small quantity of gold as to render the extraction thereof by hydraulic machinery unprofitable. A court of equity is not the guardian of competent persons, who must be permitted to manage their own affairs in any manner that best suits their judgment, so long as they do not interfere with the rights of others. It is true that the defendants and other miners

on Blue Canyon Creek placed the tailings from their mines in that stream, which causes such debris to be backed upon the defendants' mining ground by plaintiff's upper dam, but the weight of the testimony convinces us that her grantor entered into a contract with the Marysville Mining Co., the defendants' predecessor in interest, whereby such company was permitted to construct the race through the land now owned by her, and to deposit tailings in the conduit. By means of the ditch from plaintiff's upper dam she is enabled to irrigate the greater part of her land, and to deprive her of the use of the water by such means will necessarily injure her premises, and seriously damage her, notwithstanding which we believe she should be enjoined from maintaining the upper dam when the working in good faith of the placer mines by the defendants and their successors in interest anywhere on the creek within a quarter of a mile from her west boundary would be materially injured thereby.

2. The upper dam was not injuring the defendants' mines where they were working when they removed the obstructions; and hence no immediate necessity existed for a resort to the method adopted by them for the demolition of the property, for they could have then secured their rights by a suit; and, this being so, the costs of the lower court will not be disturbed. The decree there rendered will be modified, and one entered here as indicated in this opinion, but in all other respects affirmed, the plaintiff to be permitted at all times to irrigate her land by the lower dam and ditch, the defendants to recover their costs upon this appeal.

MODIFIED.

Decided 31 July, 1906.

HAUN v. MARTIN.

86 Pac. 371.

PUBLIC LANDS—TIMBER CULTURE CLAIMS—DEATH OF ENTRYMAN—INTEREST OF HEIR.

1. Where a timber culture claimant dies before performing the conditions precedent to obtaining title, his heir succeeds to the claim and may obtain a patent therefor in his own name by proof of performance by him and his ancestor of the required conditions, in which case he

takes directly as a donee of the government, and not by inheritance, the ancestor's interest terminating on his death.

ADMINISTRATORS—POWER OF PROBATE COURT TO ORDER MORTGAGE OR SALE OF TIMBER CULTURE CLAIM.

2. After the death of a timber culture claimant before he has performed the conditions necessary to obtain title, a probate court has no jurisdiction whatever over the land claimed, and cannot authorize the administrator of the claimant's estate to exercise any control over it for any purpose, and it is not liable for the debts of the estate.

ESTOPPEL—SUFFICIENCY OF PLEA.

3. In pleading an estoppel the facts relied on must be stated with particularity, nothing being left to inference, and it must further appear that the party pleading the estoppel relied on the facts stated, believing them to be true, and that he will be prejudiced in a stated way if they are disproved.

ELEMENTS OF EQUITABLE ESTOPPEL.

4. To justify the application of the rule estopping the owner of land from disputing the title of a purchaser thereof from another, it must appear that the true owner either encouraged such purchase or by his gross negligence in not declaring his rights induced the purchaser to change his position, in ignorance of the truth and to his damage.

ESTOPPEL—CASE UNDER CONSIDERATION.

5. A timber culture claimant died before performing the conditions precedent to obtaining title from the government. A county court authorized the administrator to mortgage the land to secure money for the purpose of purchasing the same from the government. Afterwards the county court authorized a sale of the property to pay the mortgage and other indebtedness of the estate of the decedent. The heir did not object to the sale, after being cited by publication, and it was not claimed that he ever had any actual notice of the sale or in any way except by silence and absence, induced the purchaser to buy at the administrator's sale. He did, however, refuse to pay the mortgage, and has not offered to redeem from the sale, though not under age. *Held*, that the heir was not estopped from asserting title to the claim as against the purchaser at the administrator's sale.

From Wallowa: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

Haun in an action at law brought by Edward J. Martin against him to recover the possession of real property. From the allegations of the bill it appears that the land in controversy was entered by Lucy J. Martin under the timber culture act of the United States, but before complying with the provisions thereof, so as to entitle her to a patent, Mrs. Martin died without property, leaving as her heirs the defendant and his two sisters. One of the sisters was subsequently appointed administratrix of Mrs. Martin's estate, and as such commuted the timber culture entry, and purchased the land from the United States, (48th Or.—20)

paying \$400 therefor. As the estate was without money and the heirs were unable or refused to furnish the means or make such purchase, the administratrix, upon her application and the order of the county court, borrowed \$400 for that purpose, and mortgaged the land to secure the payment thereof. Afterwards, the administratrix removed from the State, and another was appointed in her place, who secured an order of the county court, authorizing the sale of the property to pay the mortgage and the other indebtedness of the estate, citation being issued and served on the heirs by publication. The property was subsequently sold to the plaintiff by the administrator under the order referred to for \$525. The sale was duly confirmed and an administrator's deed made and delivered to him. It is charged in the complaint that the defendant refused and neglected to pay the mortgage given by the administratrix to secure funds with which to commute the timber culture entry, but consented and acquiesced in the proceedings of the administrator in reference thereto and at no time has he offered to redeem from the sale or tendered to the plaintiff any part of the purchase money or offered to pay the same. For these reasons it is averred that the defendant is now estopped from claiming title to the land in question as against plaintiff. A demurrer to the cross-bill because it did not state a cause of suit was sustained and the cross complainant appeals. The case was submitted on briefs, under the proviso of Rule 16: 35 Or. 587, 601.

AFFIRMED.

For appellant there was a brief over the names of *James A. Burleigh* and *Charles H Finn*.

For respondent there was a brief over the name of *Ramsey & Oliver*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. Upon the death of a timber culture claimant, before performance by him of the conditions precedent to obtaining title from the government, his heirs succeed to the claim, and may obtain a patent therefor in their own name by proof of full performance by them and their ancestor of the required con-

ditions, but in such case they take directly as donees of the government, and not by inheritance: *Kelsay v. Eaton*, 45 Or. 70 (76 Pac. 770, 106 Am. St. Rep. 662); *Warner Valley Stock Co. v. Morrow*, 48 Or. 258 (86 Pac. 369). When, therefore, Mrs. Martin died, her interest in her timber culture claim absolutely terminated and was at an end, and her rights passed by direct grant to her heirs as substituted beneficiaries of the government. She had, at the time of her death, no interest which could be devised or which would descend or pass to her heirs or personal representatives.

2. The proceedings of the county court in assuming jurisdiction over the claim and authorizing its sale were therefore absolutely void for want of jurisdiction of the subject-matter. The claim at that time belonged to the heirs in their own right, and such proceedings could have no more force and effect than if the county court had assumed to order the sale by the administrator of any other property belonging to them. The plaintiff clearly cannot successfully maintain title to the property based upon the proceedings of the county court.

3. It is argued, however, that the defendant is estopped by his conduct from asserting title to the property as against the plaintiff. The only averments in the cross-bill upon which such a contention can be based are that the defendant was served with citation in the county court by publication and that he refused to pay the mortgage given by the administratrix to secure funds with which to commute the timber culture entry but consented and acquiesced in the proceedings of the administrator in reference thereto. This under the law is not a sufficient plea of an estoppel. Where an estoppel is relied upon, the facts constituting it must be pleaded with particularity and precision, and it must be alleged that the party setting up the estoppel relied upon such facts believing them to be true, and will be prejudiced by allowing them to be disproved. Nothing can be supplied by inference or intendment: 8 Enc. Pl. & Pr. 10.

4. Where the owner of land which is offered for sale stands by, and with knowledge of his title, encourages the sale, or does

not forbid it, and thus another person, in ignorance of the true title, is induced to make the purchase under the supposition that the title offered is good, he is bound by the sale, and neither he nor his privies will be allowed to dispute the purchaser's title: 1 Story, Equity (13 ed.), 185. But to justify the application of this principle it is indispensable that the party sought to be estopped should by his conduct or gross negligence encourage or influence the purchase, and that the other party, being at the time ignorant of the actual title, should have been misled by his acts and conduct and induced thereby to change his position: *Page v. Smith*, 13 Or. 410 (10 Pac. 833); *Whiteaker v. Belt*, 25 Or. 490 (36 Pac. 534); *Odlin v. Gove*, 41 N. H. 465 (77 Am. Dec. 773); *Junction Railroad Co. v. Harpold*, 19 Ind. 347.

5. Now, there is no allegation in the bill that the defendant was present at the administrator's sale, or that he had actual knowledge thereof. Nor is it averred that he induced or encouraged it; or that plaintiff, in making the purchase, relied upon or was influenced in any way by the acts or conduct of the defendant, or that he was at the time ignorant of the true state of the title, and without such allegations the bill is fatally defective. The averment that the citation to show cause why the land should not be disposed of at administrator's sale was served upon the defendant by publication is no averment that he had actual notice of the proceedings in the probate court. Such a service could not have legally been made unless he was a nonresident of the State, and as the defendant made no objection to the sale it may be, for aught that appears, that he was wholly ignorant of the matter. The citation as issued and served was a mere constructive notice, and could not of itself estop the defendant from asserting title to the property since the proceedings in the county court were void for want of jurisdiction of the subject-matter. We are of the opinion that the cross-bill does not state facts sufficient to entitle the plaintiff to relief in equity, and that the demurrer was properly sustained. Let the decree be affirmed.

AFFIRMED.

Decided 17 April, rehearing denied 22 May, 1906.

STATE ex rel. v. RICHARDSON.

85 Pac. 225.

MANDAMUS—POWER TO ALLOW AMENDMENT—DISCRETION.

1. Under the provision of Section 612, B. & C. Comp., concerning the amendment of pleadings in mandamus proceedings, the trial court has a wide discretion, and its action in granting or refusing an amendment while the cause is in the trial court will not ordinarily be disturbed.

EVIDENCE—JUDICIAL NOTICE OF PRIOR HEARING.

2. Courts will take judicial notice of information acquired at previous hearings of the same cause, whether on the present or a prior appeal.

APPEAL—REMANDING EQUITY SUITS—AMENDMENTS.

3. It is discretionary with the supreme court in equity to either decide a case finally or to send it back for further proceedings when the appeal has been taken on the pleadings or when the evidence is unsatisfactory on material points, and in such cases the trial court may, in its discretion, permit amendments to the pleadings after the cause has been remanded.

APPEAL—REMANDING LAW ACTIONS—AMENDMENTS.

4. When a judgment in a law action is reversed on appeal, and the cause remanded for a new trial or for further proceedings, the court below possesses power to allow reasonable amendments to be made to the pleadings, and its action in this respect will not be disturbed, except for an abuse of discretion.

APPEAL—MANDAMUS—AMENDING AFTER REVERSAL.

5. Where a judgment sustaining a demurrer to an alternative writ of mandamus and dismissing the proceeding is affirmed on appeal and the cause remanded with a direction to enter a judgment accordingly, the power of the trial court to permit amendments still remains, and the rule is applicable to law actions generally.

PLEADING—STRIKING OUT.

6. It is not error to strike out duplicate averments, for the evidence to support them may still be offered under other paragraphs.

CONSTITUTIONAL LAW—SPECIAL PRIVILEGES OR IMMUNITIES—VALIDITY OF LOCAL OPTION LAW.

7. The Oregon local option law (Laws 1905, pp. 41, 47, c. 2), is not unconstitutional as in violation of Const. Or. Art. I, § 20, for it does not grant any special privileges or immunities whatever, though it may incidentally deny to some persons the right previously enjoyed of selling liquors as a beverage.

CONSTITUTIONAL RIGHT TO SELL LIQUORS.

8. The privilege of selling intoxicating liquors as a beverage is not a common right of American citizenship protected by the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL GUARANTY OF RIGHT OF SUFFRAGE.

9. The Oregon local option act (Laws 1905, pp. 41, 47, c. 2) is not violative of Const. Or. Art. II, § 1, protecting free and equal electoral rights, for no qualified elector is thereby prevented from freely voting at any election or deprived of having his vote counted as cast, so neither freedom nor equality is affected.

INTOXICATING LIQUORS—DUTY OF COUNTY COURT IN DECLARING RESULT OF LOCAL OPTION ELECTION.

10. The duty required of the county court by the local option law as to declaring the result of an election (Laws 1905, pp. 41, 47, c. 2, § 10),

and forbidding the sale of liquors as a beverage within the prescribed limits, is ministerial rather than judicial.

CONSTITUTIONAL LAW—JURISDICTION OF COUNTY COURT.

11. The local option act (Laws 1905, pp. 41, 47, c. 2, § 10) in requiring county courts to declare the results of local option elections, is not in violation of Const. Or. Art. VII, § 12, providing that county courts shall have probate jurisdiction and "such other duties as may be prescribed by law," for the duty of so declaring the results is one that may properly be imposed by law under the section quoted.

LOCAL OPTION—MANDAMUS ON COUNTY COURT.

12. Mandamus will lie to compel a county court to declare the result of a vote under the local option act as required by Section 10, as the act required does not involve the exercise of either discretion or judgment, being entirely ministerial.

STATUTES—TITLE OF INITIATIVE ACT MUST EXPRESS SUBJECT.

13. The validity of laws adopted at the polls pursuant to an initiative petition, under Const. Or. Art. IV, § 1, must be tested by the constitution like legislative laws, and such laws are subject to the requirement of Const. Or. Art. IV, § 20, as to subjects and title.

STATUTES—SUFFICIENCY OF TITLE OF LOCAL OPTION ACT.

14. The title of the local option law adopted by the people at the polls (Laws 1905, pp. 41, 47, c. 2) fairly expresses the subject of the act and sufficiently indicates the additional matters therewith connected, as required by Const. Or. Art. IV, § 20.

From Malheur: GEORGE E. DAVIS, Judge.

Statement by MR. JUSTICE MOORE.

This is a special proceeding, instituted by the State of Oregon, on the relation of W. L. Gibson and others, against B. C. Richardson, as county judge of Malheur County, and G. W. Blanton and G. B. Glover, as commissioners thereof, to compel them as the county court of that county to declare the result of an election held therein, November 8, 1904, to determine whether the sale of intoxicating liquors as a beverage should be prohibited in Nyssa Precinct in that county. At a former trial of this cause, a judgment dismissing the proceedings was affirmed (*State ex rel. v. Malheur County Court*, 46 Or. 519, 81 Pac. 368), and on the return of the mandate the relators, over objection, secured an amended alternative writ of mandamus, showing an alleged legal right in themselves to have the act hereinbefore specified performed. The answer of the defendant Richardson states that at all times since the votes so cast were canvassed he has been and now is ready, willing and anxious to make the order which is sought to be enforced,

but that his codefendants were opposed thereto. The answer of the defendants Blanton and Glover denies the material allegations of the amended alternative writ, and for a further defense thereto sets out the several steps attempted to be taken pursuant to the provisions of the local option liquor law, and alleges wherein such proceedings failed to comply therewith, in consequence of which defects they were absolved from performing the duty resulting from their office. For a further defense it is alleged that the local option act contravenes certain clauses of the constitution of this State. The court, upon motion, struck out all the averments of the first affirmative defense, except the allegations that the notices of election were not printed until within 16 days prior to November 8, 1904, and that neither the sheriff nor the county clerk of Malheur County ever entered in the records thereof their compliance with the provisions of the local option law, respecting the issuing of notices or the posting thereof. The court also sustained a demurrer to the second affirmative defense, relating to the violation of the clauses of the organic law of this State by the adoption of the act in question. A reply put in issue the remaining allegations of new matter, and, the cause having been tried, the court made findings of fact and of law, as stated in the amended alternative writ, and thereupon allowed a peremptory mandamus, from which judgment the defendants Blanton and Glover appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. George Wesley Hayes*.

For the State there was a brief over the name of *Cyrus Milton Van Pelt*, with oral arguments by *Mr. Van Pelt* and *Mr. George Frederick Martin*.

MR. JUSTICE MOORE delivered the opinion of the court.

It is contended by defendants' counsel that, as no further proceedings were ordered in remanding the cause on the former appeal, the court erred in permitting, over objection, the alternative writ of mandamus to be amended. In the early practice, when some particular act was sought to be enforced, a mere

letter from the sovereign power was issued, addressed to the person upon whom the duty devolved, commanding him to perform it. No return was originally allowed to the order, a disobedience of which subjected the offender to punishment. As mandatory proceedings became more general, the common-law courts, relaxing the ancient rule, permitted a return to the writ, which had taken the place of the king's letter; but the facts therein stated could not be traversed. If the return, though false, disclosed an adequate legal reason for not performing the act commanded, the proceedings were dismissed, and the petitioner's remedy was thereupon limited to the maintenance of an action to recover the damages which he had sustained by reason of the sham statement. A return was first permitted to be traversed by St. 9 Anne, c. 20, in cases involving a contest for a municipal office, and later the facts so stated were allowed to be controverted in all cases by St. 1 Wm. IV. c. 21, thereby avoiding the necessity of bringing an action for a false return. Pursuant to the rules governing the early practice in mandamus proceedings, any mistake therein of substance was fatal and could not be corrected; but after the passage of the statutes mentioned the rigor of the ancient mode of procedure was abated, so as to allow amendments to the alternative writ, when by doing so justice would be promoted, provided no new or different cause of action was thereby substituted, and this modern rule now generally prevails in this country: *Merrill, Mandamus*, §§ 5, 293, 294. Though the courts will not ordinarily permit a peremptory writ of mandamus to be altered (*High, Ex. Legal Rem.* § 519), the practice of amending an alternative writ thereof, provided no new or different cause is thereby stated, is quite general: 13 Enc. Pl. & Pr. 753; *State v. Gibbs*, 13 Fla. 55 (7 Am. Rep. 233); *State v. Bailey*, 7 Iowa, 390; *Union Pacific Ry. Co. v. Hall*, 91 U. S. 343 (23 L. Ed. 428).

1. The statute of this State, recognizing the wisdom of the rule thus outlined, prescribes what shall constitute the pleadings in mandamus proceedings, and, referring thereto, contains the following provision:

"They are to have the same effect and to be construed, and

may be amended in the same manner, as pleadings in an action. Either party may move to strike out, or be allowed to plead over after motion or demurrer allowed or disallowed, and the issue joined shall be tried and the further proceedings thereon had in like manner and with like effect as in an action": B. & C. Comp. § 612.

These liberal provisions authorize an amendment of an alternative writ of mandamus while the cause remains in the trial court, and its action in granting leave so to amend is a matter wholly within its discretion, which will not be disturbed, except in cases of an abuse thereof: *Highway Commissioners v. People*, 38 Ill. 347; *Stevens v. Miller*, 3 Kan. App. 192 (43 Pac. 439).

2. Our statute regulating the practice on appeal provides that, in affirming or reversing a judgment, this court may, if necessary and proper, order a new trial: B. & C. Comp. § 556. Observing the rule that a court will take judicial knowledge of the facts which it has acquired at a prior hearing of the cause (16 Cyc. 851; *Mills' Estate*, 40 Or. 424, 67 Pac. 107), we have examined the record pertaining to the order affirming the judgment on the former appeal and find that it concludes as follows:

"It is further ordered that the cause be remanded to the said court below, and that a judgment be there entered and docketed in accordance herewith."

3. Does the language here quoted show such a final disposition of the cause as to preclude the trial court from allowing the alternative writ to be amended? In *Powell v. Dayton, S. & G. R. Co.* 13 Or. 446 (11 Pac. 222), a demurrer to the complaint therein was overruled, and the defendants appealed. In disposing of the cause, Mr. Justice THAYER says: "The case is too important to be determined upon demurrer, and the appellants would have been allowed to answer over it, if the decision of the lower court had been affirmed. We have therefore concluded to reverse the decree appealed from and remand the case with leave to the respondents to amend their complaint." The remittitur having been sent down, the plaintiffs filed an amended complaint to which a demurrer was interposed and overruled, whereupon the defendants again appealed (s. c. 14

Or. 22, 12 Pac. 83), their counsel insisting that, in case the decision of the lower court was sustained, their clients should be given leave to answer over. In disposing of such contention, Mr. Justice STRAHAN, after referring to the former practice in this court in such cases, remarks: "We therefore announce it as a rule of practice in such cases that whenever this court does not make a final disposition of the cause, but remands the same to the court below, it will be open for that court to determine in the first instance whether the defendant shall be permitted to answer or not." In *Fowle v. House*, 29 Or. 114 (44 Pac. 692), which was a suit to enforce a mortgage, a demurrer to the complaint was sustained, and the suit dismissed, whereupon the plaintiff appealed. At the trial in this court the complaint was found to be insufficient, and the decree affirmed. The mandate having been sent down, the motion of plaintiff's counsel to recall it was denied (s. c. 30 Or. 305, 47 Pac. 787), because the cause was remanded for further proceedings.

It will be observed that the cases adverted to were suits which were dismissed because the complaints were respectively held to be insufficient on demurrer. An appeal in equity from a decree rendered on an issue of fact brings up the cause for trial anew in this court upon the transcript and evidence accompanying it (B. & C. Comp. § 555), and a final decree in such cases is usually rendered in this court. A mandate is thereupon sent to the court below, to be entered, however, as our decree, and not as that of the court *a quo*. When, on appeal from a decree in equity, the cause is sent back because the complaint is considered insufficient or the evidence inadequate to support a material averment, no final decree is rendered in this court, except to set aside the decree of the court below and to require further proceedings to be had therein. The rule, therefore, as promulgated in *Powell v. Dayton, S. & G. R. Ry. Co.* 13 Or. 446 (11 Pac. 222), applies only to suits in equity.

4. Appeals in law actions are tried in this court on bills of exceptions, disclosing alleged errors set out in the transcript (B. & C. Comp. § 555), and the conclusion here reached is, when remitted, entered in the court below as its judgment.

When a judgment, rendered on an issue of fact in a law action, is reversed on appeal, a new trial is generally ordered, unless the court below should have sustained a motion for a judgment of nonsuit, because of an entire lack of evidence: *Durbin v. Oregon Ry. & Nav. Co.* 17 Or. 5 (17 Pac. 5, 11 Am. St. Rep. 778); *McPherson v. Pacific Bridge Co.* 20 Or. 486 (26 Pac. 560); *Coughtry v. Willamette St. Ry. Co.* 21 Or. 245 (27 Pac. 1031); *Eastman v. Monastes*, 32 Or. 291 (51 Pac. 1095, 67 Am. St. Rep. 531); *Abbot v. Oregon Railroad Co.* 46 Or. 549 (80 Pac. 1012, 1 L. R. A., N. S., 851, 39 Am. & Eng. R. Cas., N. S., 52). A reversal of the judgment in each of the cases last cited was a final disposition of the cause. Where, however, a judgment in a law action is reversed on appeal, and the cause is remanded for a new trial or for further proceedings, the court below possesses power to allow reasonable amendments to be made to the pleadings, and its action in this respect will not be disturbed, except for an abuse of discretion: *Henderson v. Morris*, 5 Or. 24; *Baldock v. Atwood*, 21 Or. 73 (26 Pac. 1058); *Talbot v. Garretson*, 31 Or. 256 (49 Pac. 978); *Lieuallen v. Mosgrove*, 37 Or. 446 (61 Pac. 1022); *York v. Nash*, 42 Or. 321 (71 Pac. 59).

5. A demurrer to a complaint interposes an issue of law, the determination of which constitutes a trial by a court: B. & C. Comp. § 114; *Hume v. Woodruff*, 26 Or. 373 (38 Pac. 191). When such a trial results in sustaining a demurrer, and the plaintiff declines to amend the complaint, in consequence of which a judgment is rendered against him, and he appeals, an affirmance of the judgment leaves nothing further to be considered, and hence, the ordering of a new trial, as prescribed by statute (B. & C. Comp. § 556), would be useless. When a judgment or decree given under such circumstances is affirmed on appeal, and the cause is remanded, if the plaintiff seeks to correct his error by amending the complaint, his payment of or responsibility for the costs and disbursements incurred should be a sufficient punishment for his mistake, and his application so to amend ought to be allowed, if it is reasonable and meets the approval of the trial court. We believe that a fair inter-

pretation of the rules of practice prevailing in this State authorized the court to allow the alternative writ of mandamus to be amended, in permitting which no error was committed.

6. Considering the case on its merits, no exceptions were taken to the findings, nor was any request made for any other decision upon a question of fact, and as the findings made by the court show a compliance with the requirements of the several provisions of the local option act, thereby supporting the judgment rendered, the only questions to be considered are the action of the court in striking out parts of the answer, and in sustaining a demurrer to the other parts thereof. The averments which were struck out are lengthy, and an examination of them convinces us that no error was committed in their elimination, for evidence of the facts thus stated could have been admitted under the remaining allegations, and hence the new matter so set out will not be detailed.

7. It is insisted by defendants' counsel that the local option law violates Section 20, Art. I of the constitution of this State, which is as follows:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens"—

and that, having sought to raise this and other constitutional questions by averments of new matter in the answer, an error was committed in sustaining the demurrer interposed thereto. An examination of the provisions of the act in question fails to show that any privileges or immunities are attempted to be granted thereby. The law, when put into operation, may deny to some persons rights theretofore enjoyed, of selling intoxicating liquors as a beverage; but the act does not grant any special privileges or immunities to any citizen or class of citizens.

8. If it did, however, it would not contravene common right, because the sale of such liquors for the purpose specified is not a privilege guaranteed to the citizens of the United States.* *Sandys v. Williams*, 46 Or. 327 (80 Pac. 642).

*NOTE.—This is a reference to the rights protected by the Fourteenth Amendment to the Constitution of the United States. REPORTER.

9. It is maintained that the act under consideration is violative of Section 1, Art. II, of the organic law of the State, which is as follows:

"All elections shall be free and equal."

No qualified elector was prevented by any means whatever, so far as disclosed by the transcript, from freely voting to adopt or reject the local option law, or deprived of having his vote counted as cast, and if he exercised the right of suffrage on this particular occasion, his opportunity was equal to that of all other persons voting, and hence the act does not contravene the clause of the constitution invoked to defeat it: 10 Am. & Eng. Enc. Law (2 ed.), 583.

10. It is insisted that Section 10 of the act (Laws 1905, p. 47, c. 2) violates Subdivision 3 of Section 23 of Art. IV of the Constitution of Oregon, which is as follows:

"The legislative assembly shall not pass special or local laws in any of the following enumerated cases, that is to say: * * (3) Regulating the practice in courts of justice"—

and that it contravenes Sections 1 and 12, Art. VII of the fundamental law of the State, which, so far as involved herein, are as follows, respectively:

"1. The judicial power of the State shall be vested in a * * county court * * having general jurisdiction, to be defined, limited, and regulated by law, in accordance with this constitution.

12. The county court shall have the jurisdiction pertaining to probate courts, and boards of county commissioners, and such other powers and duties, and such civil jurisdiction not exceeding the amount of value of five hundred dollars, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary, as may be prescribed by law. But the legislative assembly may provide for the election of two commissioners to sit with the county judge, whilst transacting county business in any or all the counties, or may provide a separate board for transacting such business."

The section of the act thus challenged requires the county court, if a majority of the votes cast in an entire county, or in any subdivision thereof as a whole, or in any precinct, at an election called for that purpose, be in favor of prohibition, to

make an order declaring the result of such vote and absolutely prohibiting the sale of intoxicating liquors as a beverage within the prescribed limits. It will be observed that this section makes the declaration of the result of a majority vote for prohibition and the interdiction of the sale of intoxicating liquors as a beverage in pursuance thereof, by the county court, a ministerial act: *State ex rel. v. Malheur County Court*, 46 Or. 519 (81 Pac. 368).

11. We think the part of Section 12, Art. VII of the constitution which vests the county court with "such other powers and duties * * as may be prescribed by law," requires such court to perform the obligation thus imposed upon it by Section 10 of the act, in the discharge of which it exercises neither discretion nor judgment.

12. We conclude, therefore, that mandamus lies to compel a compliance with the requirements of this clause of the act.

13. It is contended that the title of the local option act contravenes Section 20 of Art. IV of the Constitution of Oregon, which, so far as deemed important, is as follows:

"Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title."

It is argued that the title of the act in question implies an intention on the part of the framers of the statute that it should be local in its operation, so that qualified electors in each community could, for themselves, determine whether or not the sale of intoxicating liquors as a beverage should be prohibited therein, and that no intimation is given in the inscription of the act that an aggregation of precincts in which, as a whole, a majority of the voters who were in favor thereof could impose prohibition upon a precinct in which a majority of the qualified electors was opposed thereto. The object of the constitutional inhibition in question is to prevent matters wholly foreign to the subject-matter specified in the title from being inserted in the body of the act: *Simpson v. Bailey*, 3 Or. 515; *McWhirter v. Brainard*, 5 Or. 426. In laws proposed by initiative petitions pursuant to an amendment of our consti-

tution, it would seem that the method frequently adopted by members of the legislature of securing votes for the passage of a bill by promises of reciprocal support of other measures could not be pursued, and hence one of the reasons assigned for requiring every bill introduced in the legislative assembly to comply with the requirement of Section 20, Art. IV, of the organic act of the State, so that it may stand on its own merits, the purpose of which, to be valid, must be fairly disclosed in the title, would have no application to the consideration of an act which, like the local option law, resulted from a vote of the people. The validity of laws adopted at the polls must be determined like enactments by the legislative assembly, by the test of the constitution as modified by the amendment thereto. Though the argument that a proposed measure must depend upon its own merits may not apply to acts initiated by petitions, a valid reason for requiring that the subject-matter of laws to be adopted or rejected at the polls should be stated in the title nevertheless exists. The majority of qualified electors are so much interested in managing their own affairs that they have no time carefully to consider measures affecting the general public. A great number of voters undoubtedly have a superficial knowledge of proposed laws to be voted upon, which is derived from newspaper comments or from conversation with their associates. We think the assertion may safely be ventured that it is only the few persons who earnestly favor or zealously oppose the passage of a proposed law initiated by petition who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information and usually derive their knowledge of the contents of a proposed law from an inspection of the title thereof, which is sometimes secured only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage. It is important, therefore, that the title to laws proposed in the manner indicated should strictly comply with the constitutional requirement.

14. An examination of the provisions of the act under con-

sideration shows an evident intent to make a county the utmost limit and a precinct the smallest territory in which the local option law may be put into operation, and, as the greater necessarily includes the less, a majority vote in the entire county in favor of prohibition, when carried into effect, prevents the sale of intoxicating liquors as a beverage in any precinct therein, though a majority of the qualified electors in such precinct may have voted against the law. Between these extremes of territory another district may be created which is known as a subdivision of a county, composed of two or more entire and contiguous precincts, and the adoption of local option in a subdivision as a whole, when declared as such by the county court, necessarily puts the law into operation in each precinct forming an integral part of the subdivision, though a majority of the votes cast in one of the precincts embraced therein may have been opposed to prohibition. In an election held in a county as a whole, or in a subdivision thereof, if any precinct embraced therein cast a majority vote in favor of prohibition, though a majority of the votes cast in the other parts of the territory may be against interdiction, the provisions of the act are required to be enforced in the precinct in which a majority vote was cast in favor thereof: Laws 1905, pp. 41, 47, c. 2, §§ 1 and 10. The title in question, so far as it relates to the objection urged, is as follows:

"An act to propose by initiative petition a law providing for election in any county, or any precinct therein, or any subdivision of a county, consisting of any number of entire and contiguous precincts of such county, to determine whether the sale of intoxicating liquors shall be prohibited in such county or subdivision thereof or in such precinct, * * declaring what shall constitute a subdivision of the county within the meaning of this law, * * providing for the issuance by the county court of orders prohibiting the sale of intoxicating liquors within certain limits and declaring the duties of such courts in reference thereto."

We think the title is a fair index of the subject-matter of the act, and that the last clause of the inscription quoted is sufficient to call attention to and give adequate notice of the

provisions of the law making it applicable to the territory specified under the particular circumstances hereinbefore mentioned.

Believing that no error was committed as alleged, the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Decided 21 August, 1906.

MANN v. PARKER.

86 Pac. 593.

WATERS—MEASURE OF APPROPRIATOR'S RIGHT.

1. An appropriator of the waters of a stream acquires a right thereto only to the extent of his beneficial use, and beyond the amount necessary for the purpose of the appropriation he has no right to the water in any way.

INJUNCTION BY APPROPRIATOR AGAINST SUBSEQUENT DIVERSION.

2. The issuing of an injunction against a subsequent appropriator of water to prevent the diminution of the supply to the first claimant is somewhat a matter of discretion, affected by the relative importance of the interests involved, the ability of the defendant to respond in damages and other equitable considerations.

WATERS—ENJOINING UNINJURIOUS DIVERSION.

3. An appropriator is not entitled to enjoin the use by subsequent appropriators of water that he cannot use, either because the stream carries more than his appropriation or because it carries so little as to be useless to him—in either case the original claimant is uninjured.

INJUNCTION—DISCRETION.

4. Under the facts as disclosed here a court of equity ought not to enjoin the defendant from using the small amount of water that he needs.

INJUNCTION—DISCRETION—ADEQUATE REMEDY AT LAW.

5. Where the injury, if any, sustained by plaintiff through the diversion of a certain amount of water from a stream by defendant, will be hardly appreciable in comparison with the heavy damage suffered by defendant if the diversion shall be enjoined, and it does not appear that defendant is unable to respond in damages for the injury, an injunction should not be issued.

From Baker: SAMUEL WHITE, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by P. A. Mann against Charles Parker and Charles M. Chapin to prevent the defendants from diverting the waters of Greenhorn and Greenwood creeks, in Baker County, to the prejudice of plaintiff's prior rights. Greenhorn and Greenwood creeks are small streams uniting a short distance above the head of the plaintiff's ditch. They have their origin in the mountains at an elevation of about 7,000 feet, where, (48th Or.—21)

from the 1st of November to the following April of each year, the snow is from four to eight feet deep. The ordinary flow of water in them ranges in the aggregate from 3 to 15 inches, except for four or five months in the spring and early summer, during the melting of the snow, when there is a flow from 500 to 1,000 inches. In 1868 one Elliott and his associates built a dam a short distance below their junction and constructed a ditch with a capacity of from 150 to 200 inches, by means of which they diverted water for use in placer mining, and it has been so used every year since by Elliott and his successors in interest, including the plaintiff. On account of the severe winters and the scarcity of water, mining can only be successfully carried on by the use of this ditch during the spring and summer months, extending from the last of March or 1st of April to the middle or last of August, according to the season. During the remainder of the year the plaintiff cannot use any of the water for the purposes for which it was appropriated, but has at various times sold small quantities thereof to quartz mine owners along the line of his ditch. The defendants are the owners of a quartz mine situate between Greenhorn and Greenwood creeks, a short distance above their confluence and about 1,200 feet above the head of plaintiff's ditch. In 1902 they constructed the necessary mills, machinery and other appliances for working their mine, and by means of metallic pipes diverted from three to five inches of water from these creeks for use in their mill and tailrace. In these improvements they expended a large amount of money, so that their investments represented from \$150,000 to \$200,000 at the time this suit was commenced. About the time they commenced the construction of their mill, or soon thereafter, they were notified by the plaintiff's agent that he claimed the right to all the waters of the two streams and that they would be expected to pay \$1.50 a day for the use thereof "as an acknowledgment of his right," and there is testimony tending to show that they agreed to do so, although it is disputed. They commenced the operation of their mill in January, 1903, and continued until September following, when, having refused to pay plaintiff for the use of

the water, this suit was commenced to enjoin them from using such water and from casting debris and tailings into the stream, so that it would be washed into the plaintiff's ditch. A preliminary injunction was issued, and defendants were compelled to and did shut down their mill. Upon the trial the injunction was made perpetual, and the defendants appeal.

For appellants there was a brief and an oral argument by *Mr. A. B. Winfree*.

For respondent there was a brief and an oral argument by *Mr. John L. Rand*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. It is admitted that plaintiff has a prior right as against the defendants to the use of water from Greenhorn and Greenwood creeks to the carrying capacity of his ditch during the placer mining season, and that defendants have no right to interfere therewith. The contention for defendants, however, is that they are entitled to use a sufficient amount to operate their mill during such times as plaintiff is not using it for the purposes of his appropriation. An appropriator of water acquires a right therein only to the extent to which it is applied to a beneficial use, and he cannot claim any more than is necessary for such purposes. "The appropriation of water to a beneficial use," says Mr. Justice MOORE, "is founded upon the rule of necessity, which, when satisfied, becomes the measure of the right, whereupon subsequent appropriators may use the surplus, or that to which the prior appropriator is entitled, when not necessary to his use": *Mattis v. Hosmer*, 37 Or. 523 (62 Pac. 17, 632). An appropriation does not confer such an absolute right to the body of water diverted, or to that flowing in the stream, that the appropriator can allow it to run to waste or prevent others from using it for mining or other legitimate uses, when it is not necessary for the purposes of his own appropriation. There may be, therefore, more than one appropriator of the waters of the same stream. The first appropriator has a right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation; but in

subordination to this right subsequent appropriators may use the channel or waters of the stream as they may choose, and while enjoying his original right the first appropriator has no cause to complain.

2. What diminution of the quantity will constitute an invasion of the rights of the prior appropriator will, of course, depend upon the facts and circumstances of each case, and whether upon his petition a court of equity will interfere to restrain such diminution "will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction": *Atchison v. Peterson*, 87 U. S. (20 Wall.), 507, 515 (22 L. Ed. 414).

3. Now, applying these principles to the case in hand, the solution is easy. It appears from the evidence that, in order to make any beneficial use of the waters for mining purposes, plaintiff must have from 150 to 200 inches at his mines during the mining season, and from 15 to 20 inches when he "cleans up"; that during a portion, if not all, of the mining season, which, as we have said, extends from the last of March or the first of April to the middle or last of August, there is more water in the two creeks than plaintiff's ditch will carry; and that from the close of the mining season until the following spring there are only from 3 to 15 inches. It is clear, therefore, that plaintiff cannot use the water for the purposes of his appropriation during the dry portion of the summer and fall, or in the winter months, because there is not sufficient, and the diversion of from three to five inches by the defendants during the spring or flush season is no injury to him, because there still remains more water in the streams than his ditch will carry. It would seem, therefore, that the use of the water by the defendants could not injure the plaintiff.

4. But it is claimed that it is necessary for water to flow

into and through plaintiff's ditch at all seasons of the year, to keep it open and in condition to take up and carry the flush waters of the spring to his mining grounds, and that such is a beneficial use and within the limits of his appropriation. There is some evidence to support this contention. Its force and effect, however, are largely impaired by the fact that plaintiff was willing to sell to defendants from three to five inches of water before it reached the head of his ditch for \$1.50 a day, "as an acknowledgment of his rights," thus indicating that he did not regard it as essential to the preservation of his ditch. And the origin of this litigation is, as we read the testimony, not so much that the small quantity of water diverted by the defendants materially interfered with the plaintiff's rights as a prior appropriator, as that the defendants are unwilling to pay the plaintiff for water flowing in the stream above the head of his ditch, whether he can make a beneficial use of it or not. Under such circumstances we do not think a court of equity ought to exercise the extraordinary remedy of injunction and restrain the defendants from using the water for the operation of their mill.

5. The evidence shows that the injury sustained by the plaintiff, if any, by reason of defendants' use, is hardly appreciable in comparison with the damages which would result to them from the suspension of the operation of their mine, and if plaintiff is damaged he has an adequate remedy at law. There is no evidence that defendants are not responsible and capable of answering for damages which their use of the water will produce, if any, to the plaintiff. There is no claim on the part of the defendants that they have a right to dump their tailings into the stream above the head of plaintiff's ditch and they have no purpose or intention of doing so, and therefore injunctive relief is unnecessary for that purpose.

The decree is reversed, and the complaint dismissed.

REVERSED.

Decided 21 August, 1906.

RESER v. UMATILLA COUNTY.

86 Pac. 595.

ANIMALS—RUNNING AT LARGE—POLICE POWER—GRAZING.

1. Under the general police power a state may prohibit the running at large of stock and compel the owners of such animals to keep them within an enclosure, and may even prohibit the grazing of animals within certain districts.

ANIMALS—TAX FOR GRAZING PRIVILEGE.

2. *Quære*: Can a state, as an incident of the police power, exact a charge for the privilege of grazing animals or allowing them to run at large?

LICENSE AND TAX DISTINGUISHED.

3. A tax is a charge imposed upon persons or property by government, while a license is a charge for a privilege.

CONSTITUTIONAL LAW—UNIFORMITY OF TAXATION—SHEEP LAW.

4. A law imposing on each sheep brought within a state a charge so great as to be obviously not a license fee, and under such conditions that the charge is against the property and not against the sheep owner or the business of sheep raising, is a revenue measure imposing a tax, and unconstitutional because the tax is not levied according to the value of each piece of property assessed, thereby producing unequal and ununiform taxation in violation of Const. Or. Art. IX, § 1.

From Umatilla: WILLIAM R. ELLIS, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

In 1905 the legislature passed an act "to tax all foreign sheep coming into the State of Oregon for the purpose of pasturage, or being driven through the State," which act is as follows:

"Sec. 1. That all sheep, whose owner or owners residing outside of the State of Oregon, shall bring or cause to be brought into the State of Oregon, any such sheep, for the purpose of pasturage, or for the purpose of driving such sheep through the State of Oregon, such sheep shall be liable for, and the owner thereof shall pay, the following tax upon each and every head of sheep: 20 cents per head for the purpose of pasturage by the year or any fractional part of a year, and when any such sheep shall be driven from the state or any county of the state, such sheep shall be taxed, and the owners thereof made to pay, 5 cents per head for each and every county through which such sheep shall be driven; and taxes herein specified shall be a preferred lien against any sheep liable to such tax, and the stock inspectors of the several counties of this state may take into their possession any of said sheep and keep and retain such possession until such taxes are paid; provided, that if such tax

so due is not paid within thirty days after the same has been assessed, any inspector of stock having any such sheep shall sell the same, by giving ten days' published notice in the nearest newspaper to where said sheep is held, of the time and place of such sale. And the sale, as herein provided for, shall convey an absolute title to any and all sheep so sold; provided, that the owner of any sheep so sold may, within ten days thereafter, redeem such sheep by paying all charges incurred in the keeping and sale thereof, together with the tax due thereon, and 10 per cent interest and damages thereon on the whole amount of taxes and charges.

Sec. 2. The stock inspectors of the several counties of this State are hereby empowered to collect the taxes mentioned in Section 1 of this act; and it shall be the duty of such inspectors to collect all taxes and fines hereunder, and to keep careful watch that all foreign sheep shall pay all the taxes and fines herein provided for; and when any such sheep shall come or be driven into any county of this State, it shall be the duty of the stock inspector of such county to immediately take such sheep into his possession and to keep and retain possession of the same until the taxes and fines due thereon are paid, or until the sale thereof, as herein provided for, has been made; and all taxes and fines collected under this act shall be paid into the general fund of the county where collected. The stock inspector shall be allowed \$3.00 per day for each and every day actually employed, and said wages to be paid by the county for which such services are rendered; provided, that when the inspector of any county has to take any stock in charge and sell the same, in order to collect the taxes and fines due thereon, then such per diem charge of \$3.00 per day shall be a charge against any sheep so held and sold for taxes and fines, as herein provided for.

Sec. 3. When any tax shall be paid by the owner or owners of any sheep, the stock inspector, to whom such tax is paid, shall issue a tax certificate to the party so paying, which receipt or certificate shall state for what purpose the same was issued, whether for pasturage or driving; provided, that under no condition shall any stock inspector issue any certificate, permit, or receipt, whether for pasturage or driving, for any diseased or unhealthy sheep, but shall immediately cause all diseased or unhealthy sheep to be taken beyond the limits of the State at the point where the same sheep entered the State. The owner or owners of any sheep who shall fail or refuse to immediately remove any diseased or unhealthy sheep (when

brought into this State) when ordered to do so by any stock inspector, shall be fined \$25 for each and every day that such stock is kept within the State after having been notified to remove the same by the stock inspector of the county wherein such stock is located.

Sec. 4. The provision of this act shall not apply to any of the hereinbefore mentioned stock that shall be brought into the State for the purpose of being fed through the winter months of November, December, January and February, of each year, or to any stock being shipped to market." Laws 1905, p. 268, c. 156.

The plaintiff, W. P. Reser, is a resident of Washington and the owner of 100 head of sheep, which were driven into Umatilla County, in this State, for the purpose of pasturage in the spring of 1905. In July of that year the stock inspector threatened to take possession of the sheep and sell them as provided in the act referred to unless the tax of 20 cents a head was paid thereon. In order to avoid such seizure and sale, the plaintiff paid the tax under protest, and the same was converted into the general fund of the county. The plaintiff thereafter brought this action to recover the amount so paid, on the ground that the law under which it was exacted was unconstitutional and void, because not in accord with Section 1, Art. IX, of the Constitution of Oregon, which provides that the rate of assessment and taxation shall be equal and uniform. The plaintiff had judgment in the court below, and the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *A. M. Crawford*, Attorney General, and *Gilbert Walter Phelps*, District Attorney, with an oral argument by *Mr. Phelps*.

For respondent there was a brief with oral arguments by *Mr. Oscar Cain* and *Mr. Herbert C. Bryson*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. It is conceded by the defendant county that if the law in question is a revenue measure, and the sum required to be paid by the owners of foreign sheep a tax, it is void, because the tax is not uniform or levied according to value. But the conten-

tion is that the law was designed simply to regulate and control the pasturage of foreign sheep, and comes within the police power. There is no doubt that the keeping of live stock within the State is under police regulation. The State may prohibit the running at large of such animals, and compel their owners to keep them within their own inclosures, and it has been held that it may prohibit their grazing or being herded within certain prescribed territory: 2 Tiedeman, State and Federal Control, 838; *Sifers v. Johnson*, 7 Idaho, 798 (65 Pac. 709, 54 L. R. A. 785, 97 Am. St. Rep. 271); *Sweet v. Ballentyne*, 8 Idaho, 431 (69 Pac. 995); *Spencer v. Morgan*, 10 Idaho, 542 (79 Pac. 459).

2. And, as an incident to the power to regulate and control, it may be that the State can exact a charge or fee for the privilege of allowing stock to run at large. But we do not think the law under consideration is of that character.

3. It is sometimes difficult to distinguish between a tax and a license. Generally speaking, a tax is a charge or burden imposed on persons or property for the support of the government or for some specific purpose authorized by it. Its object is to raise revenue: Bouvier, Law Dic. A license, however, is a permission to do what would otherwise be unlawful. The fee or charge often exacted therefor is in law supposed to cover the cost of issuing the license and the expenses incident to regulating and controlling the business, although it may ultimately result in a source of revenue. To relieve a law imposing a burden or tax upon persons or property from the operation of the constitutional provision relative to taxation, it must have for its primary object the granting of some privilege or the imposing of some restraint. A license is essentially a grant of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not enjoyed by the class of citizens to which the licensee belongs: *Home Insurance Co. v. City Council of Augusta*, 50 Ga. 530. "The object of a license," says Mr. Justice MANNING, "is to confer a right that does not exist without a license": *Chilvers v. People*, 11 Mich. 43. And Judge DEADY says that it is "a permission to do what was

unlawful at common law, or is made so by some statute or ordinance, including the one authorizing or requiring the license": *The Laundry License Case* (D. C.), 22 Fed. 703. And Mr. Justice COOLEY says that the popular, as well as the legal, understanding of the "word 'license' undoubtedly is a permission to do something which without the license would not be allowable": *Youngblood v. Sexton*, 32 Mich. 406 (20 Am. Rep. 654). The distinction between a tax upon a business or property and a license may be said to be that the former is exacted by reason of the fact that the business is carried on or the property is within the jurisdiction of the taxing power, and the latter is required as a condition precedent to the right to carry on such business or have such property within the jurisdiction.

4. Within these definitions a mere tax on sheep of nonresident owners cannot be said to be a license unless the payment of such tax confers some right or privilege upon such owners which otherwise would not exist. We do not understand that such is the case here. The law is entitled, "An Act to Tax All Foreign Sheep Coming Into the State of Oregon," etc., and simply provides the amount of such tax and the manner of its collection. No special privileges are granted to the nonresident owner by reason of the payment of the tax, nor is the payment of such tax made a condition precedent to the right to bring sheep into the State, if, indeed, such legislation would be valid: 21 Am. & Eng. Enc. Law (2 ed.), 799; *Farris v. Henderson*. 1 Okl. 384 (33 Pac. 380). Nor does the failure to pay the required tax render the pasturing of sheep in the State illegal, any more than the failure of a man to pay the taxes upon his farm renders the occupation of farming illegal. The law does not pretend to impose any restraint upon the sheep industry and no privilege is granted by its terms. The burden imposed is upon the property, and not upon the business, and applies alike to the man who brings his sheep into the State to pasture them on land of his own or that of the government and the man who brings his sheep into the State to pasture them upon the land of the State. We are therefore forced to the con-

clusion that it is essentially a revenue law and void, within the rule announced in *Ellis v. Frazier*, 38 Or. 462 (63 Pac. 642; 53 L. R. A. 454), because the tax is not uniform and equal, nor levied with reference to the value of the property.

And such is the conclusion reached by other courts upon substantially the same character of legislation. Thus an act of the legislature of Colorado providing that nonresidents grazing cattle in any county of the state should pay a certain fixed sum per head in lieu of all taxes was held void, because in violation of the constitutional provision that all taxes shall be uniform upon the same class of subjects: *Kiowa County v. Dunn*, 21 Colo. 185 (40 Pac. 357). So, also, a law providing for a special tax of a stated amount for the benefit of public roads upon all road wagons and other vehicles, irrespective of their value, was declared invalid by the Supreme Court of Alabama: *Smith v. Court of County Commissioners*, 117 Ala. 196 (23 South. 141). Likewise an act requiring every corporation or company operating a railroad or any part of a railroad within the state to pay a fee of \$1 a mile for each mile of track was held to contravene the provisions of the Ohio constitution, requiring equal and uniform taxation: *Railroad Co. v. State*, 49 Ohio St. 189 (30 N. E. 435). And in Georgia a municipal ordinance imposing a specific tax of \$1 a head on each horse or mule sold by drovers in the city was declared void, because in violation of the provision of the state constitution that taxation shall be *ad valorem* and uniform on all property of the same class: *Livingston v. City Council of Albany*, 41 Ga. 21. So, also, an ordinance imposing on bicycles and other wheel vehicles a tax to be used for the improvement of the streets was declared to be within the inhibition of the state constitution of Illinois against double taxation, and void because unequal and not uniform: *Chicago v. Collins*, 175 Ill. 445 (51 N. E. 907, 49 L. R. A. 408, 67 Am. St. Rep. 224). Minnesota has a constitutional provision similar to ours, and in *State v. Lakeside Land Co.* 71 Minn. 283 (73 N. W. 970), it was held that a law providing for a system of taxation on mining property and products by the payment of a fixed sum per ton for all ore

mined or shipped was void, the court saying: "It would be difficult to conceive of a system of taxation more obnoxious to the constitution." Under a similar constitution the Supreme Court of Louisiana held that the legislature could not levy a tax upon cotton by the pound: *Sims v. Parish of Jackson*, 22 La. Ann. 440.

It follows that the judgment of the court below must be affirmed, and it is so ordered. AFFIRMED.

MR. JUSTICE HAILEY, having been of counsel, took no part in this decision.

Argued 17 July, decided 21 August, rehearing denied 23 October, 1906.

PARKERSVILLE DRAINAGE DISTRICT *v.* WATTIER.

86 Pac. 775.

JUDGMENT—RES JUDICATA—PARTIES CONCLUDED.

1. A judgment or decree, to be available as an estoppel barring a subsequent proceeding, must have been between the same parties or others in privity with them.

APPROPRIATION OF WATER—JUDICIAL NOTICE OF LOCAL CUSTOM.

2. In the case of a water appropriation on the public domain claimed under the act of Congress of July 26, 1866 (14 Stat. U. S. 253, c. 262, § 9), it is not necessary to offer evidence of local custom, as the right and method of appropriation was so universal that the courts know it by judicial notice: *Speake v. Hamilton*, 21 Or. 3, and *Brown v. Baker*, 39 Or. 66, followed; *Lewis v. McClure*, 8 Or. 274, overruled.

SWAMP LAND—WHEN TITLE PASSED TO THE STATE.

3. Under the congressional act of 1860, extending the benefit of the swamp land act to Oregon (12 Stat. U. S. 3, c. 5), the title to land claimed thereunder did not pass until the issuance of patents.

WATERS—USES OF APPROPRIATION.

4. Damming a stream on public land of the United States so as to overflow adjoining ground, and using the power thus obtained in operating a sawmill and flour mill was an appropriation of the right to use the water so impounded for "manufacturing purposes," within the meaning of the congressional act of July 26, 1866, now Rev. Stat. U. S. § 2339.

WATERS—RIGHTS OF APPROPRIATOR FOR MANUFACTURING.

5. Since the rights of those who had appropriated water from the public domain for manufacturing purposes prior to a conveyance thereof were protected by the act of congress of July 26, 1866 (14 Stat. U. S. 253, c. 262, § 9), and the rights of such persons were also protected against persons desiring to construct drainage ditches by the legislative act authorizing the digging of such ditches (Laws 1868, pp. 21, 22, § 9), a subsequent patent issued without reserving vested or accrued water rights does not affect them.

From Marion: WILLIAM GALLOWAY, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by the Parkersville Drainage District by S. W. Jones, Frank J. Bolter and L. D. Kelly, its trustees, against William Wattier and others, heirs of Vallier Wattier, deceased, to enjoin interference with the drainage of certain lands in Marion County. The complaint states that the plaintiff was duly organized July 14, 1904, as a drainage district, giving its boundaries, at which time the trustees named were elected, and that they are now its qualified and acting representatives; that at the easterly end of the district is situated lot 3 of section 7 in township 6 south, of range 1 west of the Willamette Meridian, which premises were conveyed to the State of Oregon by a patent of the United States dated July 24, 1904; that prior thereto the State of Oregon assigned all its right to such lot, which interest was reassigned to William P. Miller, and, notwithstanding the consideration therefor was fully paid, the State thereafter executed a deed of the premises to Vallier Wattier, now deceased; that Miller instituted a suit against Wattier, and such proceedings were had therein that, after substitution of parties plaintiff and defendant, in consequence of the death of each, it was decreed by the supreme court that Wattier's heirs held the legal title to the lot in trust for Miller's representatives (*Miller v. Wattier*, 44 Or. 347, 75 Pac. 209); that the lands in such district are all swampy, and in order to drain them the trustees named, on behalf of the district and of all parties interested therein, entered upon the lot mentioned, in the channel of Little Pudding River, and removed some of the natural obstructions, so as to make an outlet for the accumulated water standing on the greater part of the lands included in the district, whereupon the defendants threatened to interfere with such draining, and will do so unless restrained, thus preventing the water from flowing through the opening made, to plaintiff's irreparable injury. The answer denies the material allegations of the complaint and avers *inter alia* that the defendants are the owners in fee of certain real property, describing it, on which are erected a flouring mill and a saw-

mill, the machinery of which is operated by water power, secured by building in such river a dam, whereby the water of that stream is retained and also backed up in Lake Labish, overflowing most of the lands in the alleged district; and that the right to maintain such easement was perfected in 1849 by their predecessor in interest, who appropriated the water of such lake and river pursuant to the local customs, laws and decisions of the courts, and as recognized and acknowledged by the United States and by the State of Oregon, which water has ever since that time been used in operating these mills. The cause was tried and the temporary injunction that had been issued when the suit was instituted was made perpetual, restraining the defendants from interfering with the draining of the lands in the district, and they appeal. REVERSED.

For appellants there was a brief over the name of *George Greenwood Bingham*, with an oral argument by *Mr. Bingham* and *Mr. William Ewing Richardson*.

For respondent there was a brief with oral arguments by *Mr. William Henry Holmes* and *Mr. Webster Holmes*.

MR. JUSTICE MOORE delivered the opinion of the court.

The questions presented by this appeal are whether or not the appropriation, as alleged in the answer, is valid and the evidence thereof adequate. The testimony shows that about 1849 a dam was built near the mouth of Little Pudding River, whereby the water thereof was retained and also backed up in what was originally called "Lake Labish," through a part of which that stream flows. This dam was about eight feet high and the backwater therefrom extended the surface of the lake four miles, making it in some places a half mile wide. In 1851 and the following year a sawmill and a flouring mill were respectively built near the dam, from which races were dug and the water in the pond was conducted therein to the mills, where it was used in operating them. In the winter the water is occasionally so high, and in the summer it is sometimes so low, as to prevent the manufacture of lumber or flour, but, except at such stages of the river, the mills referred to have been continu-

ously operated ever since they were built, and the property, including the alleged water right, has become quite valuable, averred to be worth \$25,000. The water in the pond that is raised by the dam covers about 1,875 acres of land, which, if drained, would undoubtedly prove very productive, for it has been for many years enriched by alluvial deposits. Some of the lands at the head of the lake have been drained by conducting the water into the Willamette River, and the premises thus reclaimed are valued at about \$75 an acre. If it be conceded that all the lands in the district and now covered by the water in the pond are equal in value to the premises that have been drained, a moment's calculation will demonstrate the magnitude of the interests involved and the importance to the persons affected thereby of any decree that may be rendered herein. The plaintiff's trustees having secured a resurvey of lot 3 in the section named, and considering that a part of the defendants' dam was built thereon, destroyed such piece with dynamite, thereby permitting much of the water in the pond to flow out, and then commenced this suit to enjoin the restoration of the dam.

1. It will be remembered that the complaint states that it was decreed by this court that the defendants herein held the legal title to the land at the outlet of the pond in trust for Miller's representatives: *Miller v. Wattier*, 44 Or. 347 (75 Pac. 209). An examination of that case will show that on April 9, 1872, the Board of Commissioners for the Sale of State Lands sold the lot mentioned as swamp land to John F. Miller, and though his assignee, William P. Miller, paid the consideration therefor, the board, on January 9, 1893, executed a deed of the premises to Vallier Wattier. At the trial of this cause the plaintiff offered in evidence a certified copy of the judgment roll in the case of *Wattier v. Miller*, 11 Or. 329 (8 Pac. 854), wherein it was decreed by this court that the ancestor of the defendants herein, as owner of the soil on which his mills stood, had acquired no right by prescription to turn the water of Little Pudding River back upon the land of a proprietor above him.

Neither the decree in that case nor in the case of *Miller v. Wattier*, 44 Or. 347 (75 Pac. 209) is pleaded as an estoppel in the case at bar. As estoppels must be mutual, neither decree mentioned constitutes a bar to the maintenance of the defense of an appropriation of the water now interposed; for, so far as we are able to discover, there is no privity of any kind existing between the plaintiff herein and either of the parties to the former suits, and unless the subsequent suit is between the same parties or their privies the decrees theretofore rendered are not *res judicata*: 24 Am. & Eng. Enc. Law (2 ed.), 724; *Morrison v. Holladay*, 27 Or. 175 (39 Pac. 1100); *Landigan v. Mayer*, 32 Or. 245 (51 Pac. 649, 67 Am. St. Rep. 521); *Mullaney v. Evans*, 33 Or. 330 (54 Pac. 886); *Poley v. Lacert*, 35 Or. 166 (58 Pac. 37); *Baring v. Fanning*, Fed. Case No. 982.

2. Considering the sufficiency of the evidence, as the defendants offered no testimony tending to prove the averment of their answer that the alleged appropriation of the water was made pursuant to any custom, etc., plaintiff's counsel, invoking the doctrine announced in *Lewis v. McClure*, 8 Or. 274, insist that no foundation was laid for the establishment of the right which they assert. In the case to which attention is called it is held that when a party alleges a right to appropriate water pursuant to a local custom and such averment is denied, the burden is thus imposed on the party alleging the fact to prove it, and for a failure in this respect the court would not take judicial notice of such custom. In *Brown v. Baker*, 39 Or. 66 (65 Pac. 799, 66 Pac. 193) it was ruled that a failure to allege or prove that a diversion of water was made in accordance with local custom, etc., did not defeat the right of appropriation. One person could not well establish a valid custom, and to hold that an allegation that an appropriation of water to a beneficial use was made conformable to custom and to require proof thereof, as prerequisites of an exercise of the right, would be equivalent to a denial of the use of water to the first settler in a new section of the arid country. We believe that the reference to the local custom, etc., specified in Act Cong. July 26, 1866, 14 Stat. U. S. 253, c. 262, § 9 (Rev. Stat. U. S. § 2339;

7 Fed. Stat. Ann. 1090; U. S. Comp. St. 1901, p. 1437), was equivalent to a legislative declaration that the salutary provisions of the federal law were applicable only to the Pacific Coast states, leaving it to the court to take judicial notice of such territory and custom without allegation or proof thereof. The correct rule, in our opinion, is stated by Mr. Justice HORT, in *Isaacs v. Barber*, 10 Wash. 124 (38 Pac. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772), where, in discussing the subject of an application of water to a beneficial use, he says "That such right was established by a custom so universal that courts must take judicial notice thereof." To the same effect is *Speake v. Hamilton*, 21 Or. 3 (26 Pac. 855). We conclude, therefore, that the doctrine announced in *Lewis v. McClure*, 8 Or. 274, no longer prevails in this State, and that the averment in the answer that the appropriation was made according to local custom, etc., might have been rejected as surplusage, and hence no necessity existed to offer any proof in support thereof: *Gregoire v. Rourke*, 28 Or. 275 (42 Pac. 996).

These preliminary matters having been disposed of, the question of whether or not the water of Little Pudding River and of Lake Labish was subject to a valid appropriation, will next be considered. The application for the establishment of the Parkersville Drainage District presented to the county court of Marion County, a copy of which was offered in evidence, shows the area of land claimed to have been owned by the several petitioners, but whether their title was derived immediately or mediately from the United States is not disclosed, except as to such lot 3, which was conveyed as alleged in the complaint, but the patent therefor contained no clause exempting from its operation any accrued or vested water right. The deed executed for such lot by the State of Oregon to Vallier Wattier, from whom Miller's representatives derive their title by decree of this court, was not offered in evidence, so it is impossible to specify whether or not the state reserved any water rights from the operation of its conveyance of the premises. We shall take it for granted, however, that no such reservation was made, and shall further assume that all the real property in the drain-

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age district is swamp land, within the meaning of that term as used in the act of Congress, and that the transfer of the title to the several owners is evidenced in the same manner as in the conveyance of such lot.

3. Congress on March 12, 1860, passed an act granting to the State of Oregon the swamp and overflowed lands within its borders: 12 Stat. U. S. 3, c. 5. Though such act was a grant *in praesenti*, the premises designated had to be identified as swamp and overflowed lands, and hence the title thereto remained in the United States until a patent therefor was issued: *Michigan Land & L. Co. v. Rust*, 168 U. S. 589 (18 Sup. Ct. 208, 42 L. Ed. 591); *Small v. Lutz*, 41 Or. 570 (67 Pac. 421, 69 Pac. 825).

4. Congress on July 26, 1866, passed an act from which the following excerpts are taken: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage": Rev. Stat. U. S. § 2339 (7 Fed. Stat. Ann. 1090). "All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired or recognized by the preceding section": Rev. Stat. U. S. § 2340 (U. S. Comp. St. 1901, p. 1437; 7 Fed. Stat. Ann. 1096).

The legislative assembly of this State in 1868 passed an act (Laws 1868, pp. 21, 22, § 9) authorizing the drainage of land, which contains the following provision:

"This chapter shall not be construed so as to interfere with

the rights of companies or individuals for mining, manufacturing, or watering towns or cities": B. & C. Comp. § 4368.

In 1885 an act was passed granting to individuals and to corporations rights of way over swamp and other lands belonging to the State, to construct ditches for manufacturing purposes: B. & C. Comp. § 3338. In 1899 another law was enacted which provided that all existing appropriations of water for beneficial purposes should be respected and upheld, "nor shall any existing mill be deprived of its water power, however lawfully acquired, without the consent of its owner": B. & C. Comp. § 5032. These provisions are mentioned to illustrate the very liberal policy pursued by the legislative assembly in recognizing the rights of settlers to divert and use the water flowing through the lands owned by the State of Oregon. The act of Congress of July 26, 1866, authorizing the diversion of water from streams flowing through the public domain, was the acknowledgment of a previous right instead of the creation of a new one: *Atchison v. Peterson*, 87 U. S. (20 Wall.) 507 (22 L. Ed. 414); *Basey v. Gallagher*, 87 U. S. (20 Wall.) 670 (22 L. Ed. 452); *Forbes v. Gracey*, 94 U. S. 762 (24 L. Ed. 313); *Jennison v. Kirk*, 98 U. S. 453 (25 L. Ed. 240); *Broder v. National Water Co.* 101 U. S. 274 (25 L. Ed. 790). In *Carson v. Gentner*, 33 Or. 512 (52 Pac. 506, 43 L. R. A. 130), the plaintiff maintained a ditch across certain lands owned by the State of Oregon which it thereafter conveyed to the defendants without reserving any accrued or vested water rights from the operation of the deed. The defendants having intermeddled with the ditch, it was held, in a suit to enjoin such interference, that the plaintiff had the right to enter upon their premises to repair the conduit. In referring to what is now incorporated in B. & C. Comp. as Section 3338, and alluding to the policy of the State of Oregon in enacting the clause hereinbefore quoted, it was said: "This statute was a legislative sanction, confirmatory of the customs of miners, and, like the act of Congress of July 26, 1866, was the recognition of a pre-existing right, rather than the granting of a new easement in its real property."

The doctrine, once declared, that the rights of a riparian proprietor who had secured from the United States a patent for land before the passage of the act of Congress of July 26, 1866, thereby defeated the claims of a prior appropriator of the water of a stream flowing through such lands (*Vansickle v. Haines*, 7 Nev. 249), has been expressly overruled: *Jones v. Adams*, 19 Nev. 78 (6 Pac. 442, 3 Am. St. Rep. 788). The rule adopted in the case last cited was followed in *Isaacs v. Barber*, 10 Wash. 124 (38 Pac. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772), where it was held that a valid appropriation of water could be made to operate a flouring mill east of the Cascade Mountains in the State of Washington, Mr. Justice HOYT saying: "The government, while the owner of the land, allowed the streams to be changed by the diversion of a portion of their waters. This had the effect of modifying the right to have the water flow in its natural channel except as to the portion not diverted at the time the title passed from the government, and it was only upon this portion that the common-law rule could apply. The government had changed the streams, as it had the right to do by virtue of its ownership of all the land through which they flowed, and while they were so changed conveyed the land. It must follow that its grantees took title subject to the changed condition of the streams and to the rights growing out of such change." The discovery of gold in California first gave rise to the custom, established by miners, of using the water of streams flowing through public lands to separate precious metal from the baser material in which it was found, and as this work could not be profitably performed except by such means, the right to divert water for that purpose was founded on the principle of necessity. Thereafter the use of water from such streams was extended to agriculture, manufacturing and other purposes, but the right to such enlarged uses was based on the exigency therefor. At the time the mills now owned by the defendants were built, the manufacture of lumber and of flour supplied the urgent demands of the pioneers who had come to Oregon to found homes. The grinding of grain and the sawing of logs would probably not create the excite-

ment that gold mining affords, but such manufactures subserved the needs of humanity and conduced to the comforts of mankind to such an extent that they may safely be classed as being necessities at the time the mills were erected. Based on principle, we believe that such early, pressing want impels the deduction that the right to appropriate water to manufacture flour and lumber in the Willamette Valley during the original settlement thereof, and the authority to create and maintain reservoirs to generate power, comes clearly within the provisions of the act of Congress of July 26, 1866.

The evidence shows that in surveying the donation land claim on a part of which the defendants' mills are erected, Lake Labish was meandered so as to conform to the margin thereof as made by the backwater from the dam in Little Pudding River. The lot mentioned was thereafter surveyed and, assuming that all the lands in the drainage district are of the same kind and the titles thereto were derived from the same source and pursuant to the same act of Congress as the premises owned by Miller's representatives, all the persons affected by the backwater evidently secured their lands with knowledge of the encroachment thereon.

5. It will be observed, by a comparison of the dates, that prior to the sale of such lot to John F. Miller by the State of Oregon, its legislative assembly had enacted that the provisions of the chapter authorizing the creation of drainage districts should not interfere with the right of manufacturing. This act was a recognition of pre-existing rights of prior appropriators of which the purchasers of swamp lands which were artificially overflowed were obliged to take notice, and this being so, it is immaterial whether the title to such lands passed to the State of Oregon, or whether the United States held the title in trust for the State, or for the use and benefit of the general government, for in either case the rights of the defendants as the successors in interest of the original appropriator were protected, notwithstanding the patent did not reserve any vested or accrued water right: *Carson v. Gentner*, 33 Or. 512 (52 Pac. 506, 43 L. R. A. 130); *Jones v. Adams*, 19 Nev. 78 (6 Pac.

442, 3 Am. St. Rep. 788); *Isaacs v. Barber*, 10 Wash. 124 (38 Pac. 871, 30 L. R. A. 665, 45 Am. St. Rep. 772).

It follows from these considerations that the decree should be reversed and the suit dismissed, and it is so ordered.

REVERSED.

Decided 2 January, 1906, rehearing allowed.

Decided on reargument 21 Aug., further hearing denied 23 Oct. 1906.

SEXTON v. McINNIS.

82 Pac. 1135, 86 Pac. 778.

APPLICATION OF PAYMENTS.

1. Plaintiffs and defendant became indemnitors to the surety of a contractor on his agreement to purchase supplies from them, and on his inability to complete his contract plaintiffs and defendant, in order to reduce their liability, completed the work. Plaintiffs alleged that in carrying out the work they, at defendant's request, furnished merchandise and advanced money and rendered services to the amount of \$7,322.76 above all moneys received by them on account of the contract, including the account against the contractor due plaintiffs at the time of his failure, after allowing a credit on his account for \$4,000 paid to plaintiffs by the firm composed of plaintiffs and defendant after they commenced to complete the contract. Held that, in the absence of any allegation that any of the supplies were furnished or moneys advanced or services rendered to the contractor at defendant's request, the \$4,000 was applicable only to the indebtedness of the firm of plaintiffs and defendant to plaintiffs, and not to the indebtedness of the contractor.

EQUITY—DISCRETION AS TO COSTS.

2. Under Section 566, B. & C. Comp., the costs and disbursements in equity may be imposed as discretion may suggest, as, each party to pay his own charges in the trial court, and one party to recover his costs and disbursements on appeal.

From Wasco: WILLIAM L. BRADSHAW, Judge.

Suit for an accounting by F. C. Sexton and W. E. Walther against Malcolm McInnis, in which defendant appeals from the decree. The decision was affirmed, but on rehearing the affirmance was changed to a modification. MODIFIED.

For appellant there was a brief over the names of *W. H. Wilson* and *Menefee & Wilson*, with oral arguments by *Mr. William Hall Wilson* and *Mr. Frederick W. Wilson*.

For respondents there was a brief over the name of *Huntington & Wilson*, with oral arguments by *Mr. Bela Shaw Huntington*.

Decided 2 January, 1906.

ON FIRST HEARING.

PER CURIAM. This is a suit for an accounting and settlement between parties who are sureties on a bond given by one Bertelson to indemnify the surety on his bond as a sub-contractor for a portion of the construction work on the Columbia & Northern Railway in the State of Washington. Bertelson commenced the performance of his contract, but defaulted therein, and the parties to this suit undertook to complete it. In doing so they met with considerable loss, and the object of this suit is to settle and adjust their liabilities as among themselves.

The questions involved are entirely of fact. The evidence is conflicting and irreconcilable, and no useful purpose can be served by a reference thereto in an opinion. It is sufficient to say that, after a careful and thorough examination of the testimony we concur in the conclusions of the trial court, and its decree will be affirmed.

Decided 21 August, 1906.

ON REHEARING.

MR. JUSTICE HAILEY delivered the opinion of the court.

This is a suit for an accounting, growing out of certain transactions of the parties hereto in attempting to complete a contract for bridge construction and other work, begun by one Samuel Bertelson in 1902 as a subcontractor under Corey Bros. & Alden, who had a contract to build a railroad for the Columbia River & Northern Railroad Company from Lyle to Golden-
dale, in Klickitat County, Washington. Plaintiffs, W. E. Walther and F. C. Sexton, were hardware merchants in The Dalles, Wasco County, Oregon, doing business under the firm name of Sexton & Walther; and the defendant, Malcolm McInnis, was a member of the Lyle Trading Company, a partnership composed of Malcolm McInnis and A. M. McLeod, doing business at Lyle, Washington. Bertelson was required by Corey Bros. & Alden to furnish a \$5,000 bond to insure the faithful performance of his work, and did so with the Aetna

Indemnity Company as surety thereon, and in order to secure the indemnity company he furnished it with a bond, with W. E. Walther, F. C. Sexton and Malcolm McInnis as sureties thereon; and Walther, Sexton, McInnis and Bertelson entered into an agreement providing, among other things, that in consideration of the bond signed by them Bertelson should buy certain supplies from the firm of Sexton & Walther and from the Lyle Trading Company, and that French & Co., bankers, of The Dalles, should act as trustees for themselves and Sexton & Walther and the Lyle Trading Company of all funds to be received for work done by Bertelson under his contract, and hold such funds to secure the repayment of advances made to him by them and said two firms and supplies furnished him by said firms, and should also be secured by a chattel mortgage covering all his bridge outfit, which agreement also contained the following stipulation:

"It is further understood and agreed that in case the party of the second part shall at any time fail to perform his contract with said Corey Bros. & Alden, and thereby shall become liable upon the bond given by the party of the second part and said Aetna Indemnity Company to said Corey Bros. & Alden, then and immediately the parties of the first part may at their option take possession of all said mortgaged personal property and all materials then owned by the party of the second part procured by him to be used in fulfilling said contract with Corey Bros. & Alden, and shall proceed to carry out and fulfill the said contract. * * And in case the parties of the first part shall elect to carry out said contract, and in so doing suffer any loss, they may foreclose said chattel mortgage, and out of the proceeds reimburse themselves for such loss."

Thereafter, on September 16, 1902, Bertelson failed to carry out his contract with Corey Bros & Alden and surrendered his property to the plaintiffs and defendant, who, under the firm name of Sexton, Walther & McInnis, undertook to fulfill his contract and complete the work begun by him, and in so doing incurred liabilities which finally resulted in this suit for an accounting between them.

At the time Bertelson surrendered his property to the plaintiffs and defendant he was indebted to the firm of Sexton &

Walther in a large sum, and to the Lyle Trading Company \$807.50. The plaintiffs claim that at the time of the execution and delivery of the bond to the Aetna Indemnity Company it was understood and agreed that as between them as sureties thereon the plaintiffs should bear one half and no more of any liability arising upon or by reason of such bond, and that the defendant should bear one half of such liability; but the defendant denies this and claims that the bond was executed by the sureties as individuals and not otherwise, and that any liability arising thereon should be borne by them equally—that is, one third each. It is alleged that when Bertelson failed to perform his contract he surrendered to the plaintiffs and defendant all the property then used by him in carrying out the work and requested them to take full charge of and complete the work and furnish the materials required by the contract, and that they did so because of said indemnity bond signed by them as sureties to the Aetna Indemnity Company, and to reduce their liabilities by reason of said bond, and that in so doing the plaintiffs, at the request of defendant, furnished and delivered supplies and advanced moneys and rendered services aggregating a large sum, and that the Lyle Trading Company furnished supplies and advanced moneys on account of said contract to a large sum, and that the defendant has assumed all said account of the Lyle Trading Company, and that plaintiffs and defendant cannot agree as to the amount due each party out of \$2,346.12 arising from their work under the said contract and now in the hands of French & Co., trustees, and all ask for an accounting. The plaintiffs claim that the defendant is liable for one half of the indebtedness incurred by the firm of Sexton, Walther & McInnis, and also liable for one half of the debts due from Bertelson on September 16, 1902, when he failed, and that they are responsible for the other half of all such indebtedness, and that \$4,000 paid them by the firm of Sexton, Walther & McInnis during the course of their work, and applied upon the indebtedness of Bertelson to them, was properly applied, while the defendant contends that he is liable for only one third of the indebtedness of the firm of Sexton, Walther &

McInnis and for none of the debts of Bertelson, and that the \$4,000 paid to the plaintiffs should have been credited by them on their account against Sexton, Walther & McInnis, and not on the Bertelson account. The lower court entered a decree in accordance with the claims of the plaintiffs, awarding them all the money on hand, and a decree against the defendant for \$1,692.46 and costs, from which this appeal was taken.

1. Upon petition for rehearing filed herein the principal point urged is the application of the \$4,000 paid to Sexton & Walther by the firm of Sexton, Walther & McInnis. The plaintiffs alleged:

"That, in carrying out the work and furnishing materials necessary to complete the contract of said Bertelson with Corey Bros. & Alden, the plaintiffs, at the request of the defendant, furnished and delivered goods, wares and merchandise, and advanced moneys and rendered services in the aggregate to the amount of \$7,322.76 over and above all moneys received by the plaintiffs from and on account of said contract"

which amount includes the account of Bertelson due Sexton & Walther at the time of his failure, after allowing a credit on his account for \$4,000 paid to them by the firm of Sexton, Walther & McInnis. It will be noted that this allegation is confined to the goods, wares, and merchandise furnished and delivered and moneys advanced and services rendered by the plaintiffs, at the request of defendant, to complete the contract of Bertelson. It does not allege that any of such supplies were furnished or moneys advanced or services rendered to Bertelson at the request of defendant, but limits such matters to the completion of the contract after Bertelson had failed, and there is no allegation in the complaint that the firm of Sexton, Walther & McInnis assumed the indebtedness of Bertelson to the firm of Sexton & Walther or to the Lyle Trading Company. The \$4,000 paid to the plaintiffs by the firm of Sexton, Walther & McInnis should, therefore, have been applied upon the indebtedness of that firm to Sexton & Walther, and not upon the indebtedness of Bertelson to them, and the decree of the lower court will have to be modified to that extent, and the indebted-

ness of Bertelson to the firm of Sexton & Walther and to the Lyle Trading Company disregarded.

2. Upon the question of the liabilities of the respective parties hereto for the debts of the firm of Sexton, Walther & McInnis, we think that the pleadings and evidence in the case warrant the findings of the lower court that the plaintiffs are liable for one half thereof, and the defendant the other half, and a decree will be entered here in accordance with this opinion, providing, however, that each party shall pay his own costs in the lower court, and awarding to defendant his costs upon this appeal.

MODIFIED.

Argued 12 July, decided 21 August, 1906.

STATE v. QUEN.

86 Pac. 791.

CRIMINAL LAW—THREATS BY THIRD PERSON.

In doubtful cases evidence of threats by one of several persons acting under a general plan is admissible for the purpose of showing the feelings of the conspirators, and aiding the ascertainment of truth from the conflicting claims, when the threats are reasonably connected in time and circumstance with the principal event; but evidence of threats made by a third person against the prosecuting witness cannot be imputed to defendant, though made in his presence, unless some concert of purpose is shown between such third person and defendant: *State v. Ching Ling*, 16 Or. 419, distinguished.

From Multnomah: JOHN B. CLELAND, Judge.

Wong Chow Quen appeals from a conviction of simple assault.

REVERSED.

For appellant there was a brief over the names of *Long & Sweek* and *William Wallace Banks*, with an oral argument by *Mr. Joel Minor Long* and *Mr. Banks*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General; *John Manning*, District Attorney, and *Gustavus Charles Moser*, with an oral argument by *Mr. Moser*.

MR. JUSTICE MOORE delivered the opinion of the court.

The defendant, Wong Chow Quen, was accused by information of the crime of assault with intent to kill, alleged to have been committed in Multnomah County, February 15, 1905, by

unlawfully shooting at and wounding Lee Mon Lee; and, having been tried therefor, he was convicted of simple assault and appeals from the judgment which followed. The testimony for the State is to the effect that as Lee Mon Lee, a Chinaman, was walking on Second Street in the City of Portland at night, some person touched him, and as he turned around the defendant, a fellow countryman, shot him in the back. As tending to refute the defendant's theory that the shot was fired in self-defense, the State was permitted, over objection and exception, to prove that another Chinaman, in the presence of the defendant, had threatened to take the life of the prosecuting witness. Lee Mon Lee testified that on the night preceding the shooting he visited a Chinese house of ill repute, where he found Chee How and Jue He, who asked to see his diamond ring, and the latter took it from him a few moments before the defendant arrived, and that on the night of February 15, 1905, returned to such house, where he saw the Chinaman named and also the defendant. The district attorney, referring to Jue He, inquired:

"When you were up stairs there, state whether or not this Chinaman made any threats against you or said anything to you in the nature of threats, in the presence of the defendant, Wong Chow Quen."

This question having been objected to as incompetent and the objection overruled, the witness answered:

"I demanded my ring and Jue He said: 'The ring belongs to the woman. The woman gave it to me.' They said if I came again and demanded the ring they would kill me.

Q. Was the defendant there at the time that was said?

A. Yes.

Q. What did he say, if anything?

A. He did not say anything."

The defendant's counsel thereupon moved to strike out the answer on the ground that it was immaterial and incompetent, but the motion was overruled, and an exception allowed.

No evidence having been offered tending to show that a conspiracy existed between the defendant and Jue He, or that the latter was implicated in any manner in the shooting, it is contended by the defendant's counsel that an error was committed in admitting the testimony so objected to and in overruling the

motion interposed. The admission of the testimony complained of was undoubtedly based on what was considered to have been the ruling made in *State v. Ching Ling*, 16 Or. 419 (18 Pac. 844), where it was held that evidence of threats made by co-defendants against the life of a person charged to have been killed by the defendant, but not uttered in his presence, was inadmissible on the separate trial of the latter. It might seem reasonably to be implied from the conclusion reached in that case that, if threats against the life of a person slain had been made in the presence of the person charged therewith, evidence of such menaces would be admissible against the party accused at his separate trial. This question, however, was not involved in that case, and any inference deducible therefrom is not applicable herein. Threats to take the life of, or to do bodily harm to, any person, are generally considered as expressions of the ill feeling which the speaker or writer entertains toward the person whom he dislikes. Evidence of such threats, when recently made, or when so connected as to form a chain of menaces, evincing a present purpose, is admissible in doubtful cases to illustrate what may be deemed the reasonable actions of the participants in an encounter, for the purpose of showing the *quo animo* of the person making the threats and thereby increasing the probabilities that he was the aggressor at the time of the conflict: *State v. Tartar*, 26 Or. 38 (37 Pac. 53); *People v. Arnold*, 15 Cal. 476; *People v. Scoggins*, 37 Cal. 676; *Howell v. State*, 5 Ga. 48; *Murphy v. Dart*, 42 How. Prac. 31; *State v. Goodrich*, 19 Vt. 116 (47 Am. Dec. 676); *White v. Territory*, 3 Wash. T. 397 (19 Pac. 37).

Where several persons form an association for an unlawful purpose, the act or declaration of any one of them in furtherance or execution of the common design, or that which may proximately result therefrom, is the act or declaration of all: *Commonwealth v. Campbell*, 7 Allen, 541 (83 Am. Dec. 705); *Hairston v. State*, 54 Miss. 689 (28 Am. Rep. 392); *Spies v. People*, 122 Ill. 1 (12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320); *Martin v. State*, 89 Ala. 115 (8 South. 23, 18 Am. St. Rep. 91). Thus in *Rapp v. Commonwealth*, 14 B. Mon. (Ky.)

614, the plaintiff in error was invited into a store by one Rowland, who, blocking exit by the door, drew a knife, called him a liar, charged him with the commission of offensive acts, told him if he did the like again he would cut off his ears, and made a demonstration with the weapon, whereupon Rapp shot him, inflicting a slight wound. Rapp was indicted therefor, and at his trial sought to prove that Rowland's son, who was in the store at the time of the encounter, immediately ran up stairs and returned with a pistol, which he had loaded a few days prior thereto, when he made a contingent threat to shoot Rapp. The evidence so offered was rejected, and Rapp, having been convicted, appealed, and it was held, in reversing the judgment, that the exclusion of such testimony constituted prejudicial error. Where, however, no proof of a conspiracy has been offered, evidence of threats by a person to kill or injure another, made in the presence of a third party, who thereafter assaults or kills the person against whom the threats were so made, is inadmissible against the accused: 6 Ency. Ev. 646; *Miller v. State*, 97 Ga. 653 (25 S. E. 366); *State v. Perry*, 16 La. Ann. 444; *State v. Laque*, 41 La. Ann. 1070 (6 South. 787); *Fouts v. State*, 7 Ohio St. 471; *Rufer v. State*, 25 Ohio St. 464; *Wright v. State*, 43 Tex. 170. No evidence having been offered tending in any manner to prove the existence of a conspiracy between the defendant and Jue He, the threats of the latter made in the presence of the defendant cannot be imputed to him as evincing the condition of his mind at that time toward the prosecuting witness.

An error having been committed in admitting the testimony complained of, the judgment is reversed and a new trial ordered.

REVERSED.

Decided 21 August, 1906.

BOWMAN v. HOLMAN.

86 Pac. 792.

APPEALABLE ORDER—VACATING DEFAULT.

An order vacating a default judgment, under Section 102, B. & C. Comp., as taken through mistake, inadvertence or excusable neglect, is not appealable under Section 547, as a final order affecting a substantial right.

From Circuit Court of Multnomah County.

Action by Benjamin H. Bowman against George P. Holman. Plaintiff appeals from an order setting aside a default order in his favor. Defendant now moves to dismiss the appeal.

DISMISSED.

Mr. Francis Davis Chamberlain for the motion.

Mr. Henry St. Rayner, contra.

PER CURIAM: On September 5, 1905, plaintiff recovered a judgment against the defendant by default in an action at law. On February 10, 1906, the judgment was, on defendant's application, under Section 102, B. & C. Comp., set aside and vacated, and he was permitted to answer, for the reason that the judgment was taken against him through mistake, inadvertence and excusable neglect. From this order the plaintiff has appealed, and defendant moves to dismiss such appeal because the order from which it is taken is not appealable.

The statute provides that an appeal may be taken from a "final order affecting a substantial right" made after judgment or decree: B. & C. Comp. § 547. The order in question is not of that character. It is not a final order, but merely vacated the former judgment for the purpose of a trial upon the merits of the original action. It was within the power of the court to make, and is therefore not appealable: *Deering v. Quivey*, 26 Or. 556 (38 Pac. 710); *Henrichsen v. Smith*, 29 Or. 475 (42 Pac. 486, 44 Pac. 496); *Hume v. Bowie*, 148 U. S. 245 (13 Sup. Ct. 582, 37 L. Ed. 438). The motion is allowed.

DISMISSED.

Argued 3 April, decided 12 June, 1906.

KATZ v. OBENCHAIN.

85 Pac. 617.

ATTACHMENT LIEN—DURATION—NEED OF DOCKETING JUDGMENT.

1. Under Section 301, B. & C. Comp., providing how an attachment shall be levied on real property, and Section 303, providing that attachment notices shall be recorded and that thereupon "the lien in favor of plaintiff shall immediately attach to such real property," the lien of an attachment clings to real property until the debt is paid or the property is sold under an execution pursuant to a judgment in the case, or the judgment or attachment is released in some manner provided by law, and the lien is not affected by a failure to properly docket the judgment, when recovered.

VALIDITY OF UNDOCKETED JUDGMENT—EXECUTION.

2. The validity of a judgment is not at all dependent upon its being docketed, nor is an execution regularly issued on a judgment affected by a failure to properly docket.

EFFECT OF DOCKETING JUDGMENT—ATTACHMENT LIEN.

3. The effect of properly entering a judgment in a legal docket is to create thereby a lien on the unattached real property of the judgment debtor. Where, however, the judgment is merely entered in the court record without being docketed, the attachment lien remains unaffected.

JUDGMENT AGAINST NONRESIDENT—NATURE AND LIFE OF.

4. A judgment against a nonresident based on a service of summons by publication is valid as a judgment against the attached property only, which will continue to be enforceable so long as an execution may issue.

WAIVER OF JUDGMENT LIEN BY NONENFORCEMENT.

5. In the absence of a showing of authority or intent a direction of an attorney to an officer not to sell under an execution writ certain real property on which his client had a lien cannot be considered a waiver of the lien.

MERGER—MORTGAGE AND SUBSEQUENT JUDGMENT.

6. Mergers are not favorites of equity and conflicting interests will not be considered united, in the absence of an expressed intention, where justice will be promoted by keeping them separate.

For example: Where a mortgagee acquires by deed the legal title to the mortgaged property after a subsequent lien has attached thereto, but without knowledge of that fact, equity will keep the estates separate for the protection of the mortgagee.

LIMITATION OF SUIT TO REMOVE CLOUD OR QUIET TITLE.

7. A suit to quiet title is not subject to any statute of limitations, for there is no date from which the period of limitation can be computed, as the adverse claiming is continuous.

For illustration: Where the holder of a mortgage acquires the title to and the possession of the premises without a foreclosure, after an attachment lien has accrued, a suit by him to enjoin a sale under the attachment is properly a suit to quiet his title, rather than to foreclose the mortgage, and is not affected by the statute limiting the right to sue on sealed instruments: B. & C. Comp. § 5, Subd. 2.

EQUITY—EFFECT OF GENERAL PRAYER FOR RELIEF.

8. In entering a final decree a court of equity may grant all the relief proper to be awarded under the facts proved and the law applicable thereto, under a prayer for general relief, regardless of the specific prayers.

From Klamath: HENRY L. BENSON, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit for an injunction and general equitable relief by Israel Katz against Silas Obenchain, as sheriff, and others.

On December 8, 1892, Quincy A. Brooks and wife mortgaged blocks 71, 72, 73, 86 and 87, in Klamath Falls, to the plaintiff to secure the payment of a promissory note for \$1,250 due one year after date, and bearing interest at 10 per cent per annum, and such mortgage was duly recorded on December 16, 1892. Brooks and wife were at the time and continued thereafter to be nonresidents of the State. On July 21, 1894, one Meyer commenced an action at law against them in the circuit court for Klamath County to recover money and caused the property included in the plaintiff's mortgage, together with a large amount of other real property belonging to them in that county, to be attached to satisfy any judgment he might recover. Thereafter service was had by publication upon Brooks and wife, and on November 20, 1894, Meyer recovered a judgment against them for \$5,727.75 and costs, and an order adjudging and directing the sale of the attached property to satisfy the same. This judgment was immediately entered in what was used as the judgment lien docket, but was insufficient to create a lien because it did not show the time when docketed: *Hutchinson v. Gorham*, 37 Or. 347 (61 Pac. 431); *Western Sav. Co. v. Currey*, 39 Or. 407 (65 Pac. 360, 87 Am. St. Rep. 660). Soon after the rendition of the judgment an appeal was taken to this court, pending which Brooks and wife conveyed the mortgaged property to one E. C. Brooks. The Meyer judgment was subsequently affirmed, except in so far as it was a personal one against Brooks and wife: 29 Or. 203. The mandate was entered in the court below on November 18, 1896, and the judgment again entered in the pretended judgment lien docket. On April 12, 1897, an execution and order of sale were issued thereon and all the attached property sold thereunder except that included within the plaintiff's mortgage. On May 30, 1898, E. C. Brooks and wife, in consideration of the payment to them of

(48th Or.—23)

\$500 in money by the plaintiff, and the release by him of Quincy A. Brooks and wife from any liability on their note and mortgage, conveyed the mortgaged property to the plaintiff and he is now and has ever since been the owner thereof.

On February 1, 1905, an alias execution was issued on the Meyer judgment, and the property conveyed by E. C. Brooks and wife to plaintiff seized and advertised for sale, when this suit was commenced by plaintiff to enjoin such sale. In his complaint he sets out in detail the giving of the mortgage to him by Brooks and wife and the recording of the same, alleges that no part of the principal or interest has been paid, and that on May 30, 1898, he demanded payment thereof, and thereupon E. C. Brooks and wife conveyed the mortgaged property to him in consideration of the payment to them of \$500 and the release of Quincy A. Brooks and wife from further liability on such note and mortgage, and that such conveyance was recorded on October 30, 1900; that at the time of such conveyance E. C. Brooks was the owner in fee of the property, and that plaintiff accepted the conveyance from him and paid the consideration therefor in good faith, without knowledge of any lien or incumbrance on the property, and has ever since been in the peaceable and quiet possession thereof, paying taxes thereon, and has either by himself or through his tenants made valuable improvements to the extent of more than \$3,000; that the defendant sheriff has seized and advertised the property for sale under the Meyer judgment, and that neither Meyer nor any one else has a valid and subsisting lien or claim on such property. The prayer is for an injunction restraining the sale of such property, and for such other and further relief as in equity may seem just.

The defendants answered jointly, admitting and denying the allegations of the complaint, and for an affirmative defense plead the Meyer judgment and the issuance of an execution thereon and that plaintiff's mortgage is barred by the statute of limitations. The reply puts in issue the averments of the answer, and affirmatively alleges that the lien of the attachment

and judgment in the action of Meyer against Brooks, so far as it affected the property now in controversy, was abandoned at the time the execution was issued on the judgment in 1897, because the attorney for Meyer then directed the sheriff not to sell such property for the reason that it was of less value than the amount due the plaintiff on his mortgage. A decree was rendered in favor of the plaintiff as prayed for in the complaint, and the defendants appeal.

REVERSED.

For appellants there was a brief over the names of *F. H. Mills* and *A. L. Leavitt*, with an oral argument by *Mr. Mills*.

For respondent there was a brief and an oral argument by *Mr. J. C. Rutenic*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The important questions on this appeal are (1) whether the attachment lien in the action of *Meyer v. Brooks* was waived or lost by the failure to make a proper entry of the judgment in the judgment lien docket; and, if not, (2) whether the plaintiff's rights under his mortgage were, as against the subsequent lien of Meyer's attachment, merged in the legal title acquired by him through E. C. Brooks.

1. The statute provides that the sheriff's certificate of the attachment of real property shall be by such officer delivered to the county clerk of the county in which the attached property is situate (B. & C. Comp. § 301), and that such clerk shall immediately file the same in his office and record it in a book to be kept for that purpose, and thereupon "the lien in favor of the plaintiff shall immediately attach to such real property" described therein (B. & C. Comp. § 303), and that if judgment be recovered by the plaintiff, the court shall order and adjudge the attached property to be sold to satisfy plaintiff's demand: B. & C. Comp. § 309. The proceeding by attachment is, therefore, in the nature of a proceeding *in rem*. It is against the particular property. The attaching creditor thereby acquires a specific lien upon the attached property which ripens into a judgment against the *res* when the order of sale is made. Such

a proceeding is in effect a finding that the property attached is an indebted thing, and a virtual condemnation of it to pay the owner's debt. The statute does not provide the length of time an attachment lien shall continue after the rendition of the judgment, and it must therefore necessarily continue until the debt is paid, or sale is had under execution issued on the judgment, or until the judgment is satisfied, or the attachment discharged or vacated in some manner provided by law. The validity or continuation of an attachment lien is not made dependent upon the entry of the judgment in the judgment lien docket.

2. A levy and sale under an execution issued on a judgment may be made without the judgment being docketed at all.

3. A judgment itself, however, is no lien upon real property until docketed, but the lien acquired by an attachment remains and may be enforced, and the sheriff's certificate filed with the county clerk and recorded by him informs parties dealing with the debtor of the attaching creditor's claim upon the property as effectually as does the docketing of a judgment in the lien docket. It is optional with the creditor whether a judgment is docketed at all. If it is not properly entered in the judgment lien docket the creditor has no general lien on the real property of the defendant and the rights of *bona fide* purchasers and lien creditors subsequent to the judgment and prior to the seizure of property under execution issued thereon are in no way affected by the judgment. But the failure to docket the judgment does not waive or suspend the lien acquired by the previous attachment and order of sale.

4. In the case under consideration, there could have been no benefit to Meyer in entering the judgment in the judgment lien docket. The action brought by him was against a non-resident. There was, therefore, no personal judgment against the defendants, and it would not have become a general lien if it had been docketed. The only remedy of Meyer was against the specific property. His lien thereon was acquired by the attachment, and, in the absence of a statute to the contrary,

continued during the period an execution could issue on the judgment: *Bank of California v. Cowan* (C. C.), 61 Fed. 871; *Emery v. Yount*, 7 Colo. 107 (1 Pac. 686); *Floyd v. Sellers*, 7 Colo. App. 498 (44 Pac. 373); s. c., affirmed, 24 Colo. 484 (52 Pac. 674).

5. But, it is argued that Meyer waived and abandoned his specific lien upon the property in controversy because his attorney directed the sheriff not to sell it under a previous execution. The plaintiff had no knowledge of this fact at the time he purchased the property and therefore could not invoke the doctrine of estoppel as against Meyer. Besides, there is no proof that the attorney had authority to waive the lien, or that he intended to do so. The evidence is that he directed the property not to be sold at that time because in his opinion it was not then worth as much as the amount of plaintiff's mortgage, and the costs and expenses of the sale could not have been realized out of it. We think, therefore, that Meyer's attachment and judgment are still a valid and subsisting lien upon the property and may be enforced by execution.

6. The remaining question is whether such attachment and judgment take precedence over the prior mortgage of plaintiff or rather whether such mortgage was merged in the legal title acquired by him from E. C. Brooks, and was thereby satisfied. Mergers are not favored in equity. When a lesser and a higher estate meet and coincide in the same person they will be kept separate when equity and justice require it, unless there is an expressed intention to the contrary. "It is only in those cases," says Mr. Justice LORD, in *Watson v. Dundee Mtg. & T. I. Co.*, 12 Or. 474, 483 (8 Pac. 548, 553), "where it is perfectly indifferent to the party in whom the interests had united whether the charge or term should or should not subsist, that in equity the term is merged. But if the owner has an interest in keeping them distinct, or there is an intervening right, there will be no merger. * * In the absence then of an express intention to the contrary, the intention to keep the two estates separate will be implied and presumed, when it is for the interest of the party that they should be kept separate. It will not do, then,

as was said by ELLIOTT, J., to assume, as a matter of course, that there was a merger, for there are many cases in which, in order to prevent injustice, courts will not allow merger to take place, although all the essential elements of a technical merger combine in the particular case." It is consequently said by Mr. Pomeroy that "where a mortgagee takes a conveyance of the land from the mortgagor or from the grantee of the mortgagor, if the transaction is fair, the presumption of an intention to keep the security alive is very strong. It is generally for the interests of the party in this position that the mortgage should not merge, but should be preserved to retain a priority over other encumbrances. As the mortgagee acquiring the land is not the debtor party bound to pay off either the mortgage or the other encumbrances on the land, there is nothing to prevent equity from carrying out his presumed intent, by decreeing against a merger": 2 Pomeroy, Equity (3 ed.), § 793.

Now, the mortgage of the plaintiff was prior in time and right to the lien of Meyer's attachment, and it was therefore manifestly to the interest of the plaintiff that it should not be extinguished as against any subsequent lien by the conveyance to him of the legal title to the mortgaged property, and as there was no express intention of a merger, a court of equity will, in order to prevent an injury to him, keep the two estates separate and distinct: *Watson v. Dundee Mtg. & T. I. Co.*, 12 Or. 474 (8 Pac. 548), and *Floyd v. Sellers*, 7 Colo. App. 498 (44 Pac. 373); s. c. 24 Colo. 424 (52 Pac. 674).

7. But, it is said the mortgage is now barred by the statute of limitation and cannot be foreclosed. This, however, is not strictly a proceeding to foreclose a mortgage, but rather a suit by the owner in fee of real property, who is in possession thereof, against one who is claiming or asserting some adverse claim or lien thereon, to have such right or claim determined, and is therefore not barred by the statute of limitation: *Meier v. Kelly*, 22 Or. 136 (29 Pac. 265).

8. Again, it is said that the plaintiff does not by the prayer of his complaint ask to have his mortgage restored as against

the Meyer judgment. The complaint sets up the facts out of which the equities in favor of the plaintiff arise and contains a general prayer for relief. This is sufficient to enable the court to award such a decree as the law and the facts afford: *Rutenic v. Hamaker*, 40 Or. 444 (67 Pac. 196).

The decree of the court below will, therefore, be reversed, and one entered here directing the sale of the property in controversy and the distribution of the proceeds among the several parties interested therein according to their rights as set out in this opinion.

REVERSED.

Decided 17 July, 1906.

HEYWOOD v. DOERNBECHER MFG. CO.

86 Pac. 357, 87 Pac. 530.

SALE OR AGENCY—NATURE OF CONTRACT.

1. A contract whereby defendant stipulated to sell its entire manufactured product to plaintiff as its sole agent in a territory mentioned, such product being designated in a schedule and list of prices, the contract providing that a schedule of such prices based on the present list should be made out showing the net price on each article of the entire line, the schedule remaining in force until such time as a new price list issued, a new schedule to be then made, "the schedule referred to to be attached and made a part of this contract," and "list prices to be low enough at all times to enable [plaintiff] to meet competition in the aforesaid territory," and a discount of 15 per cent from factory list prices to be allowed plaintiff, constituted a sale, and not an agency.

ATTORNEY—EFFECT OF ADMISSIONS—FORCE OF DEDUCTIONS BY TRIAL COURT IN ITS OPINION.

2. Under Section 158, B. & C. Comp., providing that on the trial of an issue of fact by the court its written decision shall state the facts found and conclusions of law separately, without argument or reason therefor, and that the court may deliver any argument or reason in support of such decision, either orally or written, separately therefrom, and file the same with the clerk, where there was a contention as to whether plaintiffs' cause of action was based entirely on an original contract or on the contract as amended by the parties, a deduction by the court in its opinion that plaintiff's counsel claimed that such cause of action was based entirely on the original contract, though not equivalent to a positive statement to that effect, is entitled to consideration as an assertion of a solemn admission by one of the parties.

ATTORNEY AND CLIENT—ADMISSIONS—EFFECT.

3. The admissions of an attorney, made within the scope of his authority and during the continuance of his employment, bind his client to the same extent as a stipulation.

CONTRACT—EFFECT OF CONSTRUCTION BY THE PARTIES.

4. In cases of ambiguity the contemporaneous construction of a contract by the parties thereto is persuasive, but where the meaning is clear,

it is the duty of the court to so declare, without reference to the opinion of the parties.

CONSTRUCTION OF CONTRACT.

5. The contract in suit here being one of sale and not of agency, it manifestly could not be construed to guarantee any rate of profit.

CONTRACT—PLEADING.

6. In an action on a contract, the complaint construed, and held not to aver an agreement for an allowance by defendant to plaintiff of certain sums as freight on shipments of furniture sold to plaintiff.

AMENDMENT—ENLARGING SCOPE OF PLEADING—REVERSIBLE ERROR.

7. An amendment to a complaint, after the submission of the cause, enlarging the scope of the complaint, constitutes reversible error, testimony tending to establish the facts so added in the amended complaint having been admitted over defendant's objection and exception.

TAXATION OF COSTS ON APPEAL.

8. The statute regulating the taxing of costs (B. & C. Comp. § 568) does not apply to the practice in the supreme court, and there is no statute now (November, 1906) on that subject.

OBJECTIONS TO COSTS ON APPEAL—HEARING BY CLERK.

9. In the absence of a statute regulating the taxing of costs and disbursements on appeal, and no rule of court on that subject having been promulgated, now in November, 1906, the court approves the practice of having all such questions submitted first to the clerk of the supreme court as standing referee, and reviewing his rulings on motion.

PRACTICE IN TAXING COSTS ON APPEAL—VERIFICATION.

10. Although the statutes regulating the taxing of costs in the trial courts (B. & C. Comp. §§ 568, 569) do not apply to the supreme court, still the requirement therein that objections must be verified is a desirable one and is hereby adopted as a matter of practice on appeal.

A claim for costs is sufficiently verified under Section 568 B. & C. Comp., where it is accompanied by a separate affidavit explaining the claim.

REVIEW OF COSTS CLAIMED IN TRIAL COURT.

11. A claim for the expense of copying the stenographer's notes of a trial to be used by the judge in settling the bill of exceptions is an item connected with the trial and must be passed upon by the lower court and appealed before the supreme court has jurisdiction to consider it.

From Multnomah: ALFRED F. SEARS, JR., and ARTHUR L. FRAZER, Judges.

Statement by MR. JUSTICE MOORE.

This is a law action by Heywood Brothers & Wakefield Co., a private corporation, against the Doernbecher Manufacturing Co. The cause of action here involved is the second of those set out in the complaint, and is the particular cause relied on to recover certain sums of money as discounts and freight alleged to have been allowed and paid by the plaintiff on defendant's account. The complaint alleges the incorporation

of the respective parties, and states that the plaintiff is a wholesale dealer in, and the defendant a manufacturer of, furniture at Portland, and that they entered into a contract whereby the former secured the exclusive right for two years from April 3, 1902, to sell in Oregon, Washington, British Columbia, Idaho, Alaska and Montana the latter's manufactured products, all of which the plaintiff stipulates to buy. The contract, a copy of which is set out, specified that the defendant would supply furniture at the regular factory list prices, less a discount of 15 per cent, a schedule of which should be attached to the agreement, and that the plaintiff would pay such prices for all shipments made to it, on receipt of the invoice. The agreement contains the following clause:

"(7) A schedule of said prices, based on the present list, to be made out, showing the net prices on each article of the entire line, such schedule to remain in force until such time as a new price list shall be issued, at which time a new schedule is to be made out, the schedule referred to to be attached and made a part of this contract. The list prices to be low enough at all times to enable the party of the second part [the plaintiff herein] to meet competition in the aforesaid territory."

The complaint further adds in substance, that prior to the making of the contract, the defendant and other manufacturers of furniture had agreed among themselves to allow the retail trade, in the territory specified, a cash discount of 2 per cent, and it was stipulated between the plaintiff and the defendant that such deductions should be borne by the former, thus reducing its profits to 13 per cent, which abatement was made by the plaintiff during the time the contract remained in force; that after the contract was signed, the defendant and other manufacturers of furniture and competitors agreed that the factory list prices of their goods should be reduced by allowing freights on shipments to various parts of such territory, and such price list was diminished in other respects by direction to plaintiff from the defendant which was thereupon required by the terms of the contract to modify the schedule attached to the agreement and to make out a new list, based on such reductions, but it failed to do so; that the plaintiff was

compelled to allow such reductions from the schedule price to the trade in the territory mentioned, to conform to the new factory prices and to such changes as were made by the defendant, to enable the plaintiff to meet competition, which discounts and remissions were made with the defendant's knowledge; that the plaintiff paid 85 per cent of the original factory list prices for all furniture received prior to January 20, 1904, amounting to \$244,217.58, when the defendant refused to deliver any more goods; that upon the receipt of and payment for furniture, plaintiff was unable to determine the proper deductions to be allowed, but upon ascertaining such amounts it immediately gave the defendant a statement thereof and charged the same to it to conform to the new factory prices and to clause 7 of the contract, to all of which the defendant consented, "and agreed to pay the same"; that the amount of such discounts and reductions is \$5,599.76 which the plaintiff overpaid the defendant, under the terms of the contract, no part of which has been repaid, except \$1,266.80.

The answer denies the material allegations of the complaint, sets up a counterclaim of \$2,277.25 for two car loads of furniture for which it had received no payment, states that the only schedule of prices adopted by the defendant after the contract was signed, was made and attached to the agreement April 25, 1903, and that all payments made by the plaintiff were in pursuance of the original and amended price lists. The averments of new matter in the answer are denied in the reply, and, the cause having been tried without the intervention of a jury, testimony was admitted over objection and exception, to the effect that the original contract had been modified by subsequent agreements of the parties, and when the cause was submitted an amendment was permitted to be made to the complaint of the clause "and agreed to pay the same," as hereinbefore indicated. The court found that the plaintiff was entitled to the sum of \$4,947.51 as discounts, etc., less the counterclaim stated, and gave judgment for the remainder, \$2,670.26, and also rendered further judgments in plaintiff's

favor for the sum of \$932.16 and \$209.81 on two other causes of action, respectively, and the defendant appeals.

REVERSED.

For appellant there was a brief with oral arguments by *Mr. A. King Wilson* and *Mr. William Torbert Muir*.

For respondent there was a brief over the names of *Cake & Cake* and *Ore L. Price*, with an oral argument by *Mr. Harry M. Cake*.

MR. JUSTICE MOORE delivered the opinion of the court.

It is conceded by the defendant's counsel that the plaintiff was entitled to the sums for which judgment was rendered on the fourth and fifth causes of action; but it is insisted that the court erred in permitting the complaint to be amended after immaterial testimony had been admitted over objection and exception, and also in refusing to grant a judgment of nonsuit on the second cause of action, for the recovery of discounts, etc., and that, as the defendant was entitled to a counterclaim of \$2,277.25, judgment should have been rendered in its favor and against the plaintiff for \$1,135.28, in excess of the sums so admitted to be due. It is argued that, though the contract in question contains a stipulation for the reciprocal purchase and sale of furniture, the second cause of action is based on the theory that the agreement created an agency, whereby the plaintiff was authorized to sell the goods delivered to it by the defendant at any price it might demand and to allow such discounts and reductions as it chose to grant to its customers, retaining a commission of 13 per cent, and that the defendant was bound by such action. The court filed with its findings an opinion to the effect that the contract of the parties manifested a sale and did not create an agency; that, though the plaintiff's counsel asserted at the trial that the second cause of action was founded on the original contract, the averment in the complaint of an agreement to allow extra discounts and special freights was equivalent to an allegation of the making of new agreements modifying the original contract, and, as

such, stated a good cause of action before amendment; and that the further averment in the complaint that these special agreements were made in accordance with the original contract and amounted to a change in the list price, should be treated as surplusage.

1. An examination of the contract referred to convinces us that it was the intention of the parties that the absolute property in the furniture was to be transferred from the defendant by the delivery of the goods to and the acceptance thereof by the plaintiff, which was to pay for and keep them, thereby creating, as the lower court properly held, a sale and not an agency: 24 Am. & Eng. Enc. Law (2 ed.), 1027. Because the defendant stipulated to sell the entire manufactured products to the plaintiff, which was designated in the schedule of furniture and the list of prices issued by the defendant as its sole agent in the territory mentioned, did not change the character of the transaction. Thus, a contract by the manufacturers of corn cutters appointing a person as general Western agent for the exclusive sale of the machine and providing for the payment of a certain amount for each, subject to a discount for cash, was held to be a contract of sale and not of agency: *Alpha Checkcrauer Co. v. Bradley*, 105 Iowa, 537 (75 N. W. 369). To the same effect see *Granite Roofing Co. v. Casler*, 82 Mich. 466 (46 N. W. 728); *Mack v. Drummond Tobacco Co.* 48 Neb. 397 (67 N. W. 174, 58 Am. St. Rep. 691).

2. The deduction by the court in its opinion that the plaintiff's counsel claimed that the second cause of action was based entirely on the original contract, though probably not equivalent to a statement to that effect contained in the bill of exceptions, is nevertheless entitled to consideration as an assertion of a solemn admission by one of the parties: B. & C. Comp. § 158.

3. The admissions of an attorney, made within the scope of his authority and during the continuance of his employment, bind his client to the same extent as a stipulation: 3 Am. & Eng. Enc. Law. (2 ed.), 327. This rule is not invoked to

charge the plaintiff with an acknowledgment of a fact prejudicial to its interests, but as tending to show the theory of its counsel as to the basis of the second cause of action.

The plaintiff's manager testified that the corporation which he represented was the agent for the defendant and as such was not authorized to sell the furniture delivered to it above or below the stipulated prices, for which service it was entitled to 13 per cent for handling the goods. We think it was the theory of the plaintiff and of its counsel that the contract of the parties created an agency, and that the averment in the complaint that plaintiff, on ascertaining the amount of the discounts and reductions, immediately gave a statement thereof and charged the same to the defendant, to all of which it assented, confirms this view. If the plaintiff was such agent and sold the furniture at a discount or paid the freight on the shipment of goods and the defendant, upon notice thereof, assented thereto, as alleged, such acquiescence was a ratification which rendered it liable to repay the sums so expended, without an averment of an agreement to pay the same. The fact that the clause "and agreed to pay the same" was omitted from the complaint, but incorporated therein by amendment after the cause was submitted, tends to corroborate the belief that the second cause of action was founded on the theory of an agency. The defendant's manager evidently thought the contract created an agency, for in a letter which he wrote the plaintiff November 18, 1903, he says:

"We note that you have made quite a material advance on the price of chiffoniers, and would like to inquire if you have been selling them at the list price, as you now have it? If so, we trust you will figure out the difference coming to us on them."

4. In *Railroad Co. v. Trimble*, 77 U. S. 367 (10 Wall., 19 L. Ed. 948), it was held that where there was doubt as to the proper meaning of an instrument, the construction which the parties to it have themselves put upon it is entitled to great consideration; but where its meaning is clear, an erroneous construction of it by them will not control its effect. To the same effect see also *Davis v. Shafer* (C. C.), 50 Fed. 764. We think

the contract under consideration admits of no doubt as to its construction, and that it stipulated for a sale of furniture and not for the creation of an agency for handling the goods. The complaint was probably prepared, however, in deference to the views of the parties in respect to the terms of their agreement and on the assumption that the construction that they had placed upon it would be controlling. The declaration, therefore, of the plaintiff's counsel that the second cause of action was founded wholly on the original contract would seem to be decisive of the controversy.

5. The paragraph of the complaint which the lower court considered tantamount to an averment of the making of a new agreement, modifying the terms of the original contract, is as follows:

"(11) That thereafter and after said contract had been entered into as aforesaid, the defendant as a manufacturer of the furniture referred to in the said contract and other manufacturers of a like kind of furniture and competitors of plaintiff entered into an agreement whereby said factory list price was reduced by the allowance of freights on various shipments to various parts of said territory, and said factory list price was reduced after said contract had been entered into in other respects by direction of defendant to plaintiff, and under and by virtue of said clause above mentioned, defendant was required to modify said schedule of prices attached to said contract and make out a new schedule based upon said factory list prices as the same were reduced as aforesaid, but defendant failed to modify said schedule attached to said contract or make out a new schedule in accordance with said reductions."

We concur in the opinion of the lower court that the contract did not guaranty to the plaintiff any rate per cent of profit on the sale of the furniture. The property in the goods being vested, on the delivery thereof, in the plaintiff, it could have resold the furniture at such prices as the demand for and the competition in the trade would warrant. The agreement of the parties was subject to the construction placed upon it by the lower court, as evidenced by its opinion, from which we take the following excerpt:

"According to the terms of this original contract the defend-

ant had a right to insist that plaintiff pay it the list price in force at any particular time, less 15 per cent as agreed upon. If the list price was too high, the plaintiff could have insisted upon its revision; but, as long as it stood, plaintiff was bound by it. The mere agreement by the parties that a larger discount should be allowed to a particular purchaser or in a particular town or district did not amount to a change in the list price. Such agreement when made was not in accordance with the terms of the original contract, but was a new agreement, or a modification of the original contract."

6. Construing paragraph 11 of the complaint in the light of the rule thus declared as applicable to the contract, there is no averment that an agreement had ever been entered into between the plaintiff and the defendant whereby the payment of any sums as freights was to have been allowed on the shipment of furniture to any part of the specified territory. It would seem that by invoking clause 7 of the original contract, plaintiff's counsel, in the paragraph of the complaint adverted to, deduced the conclusion that by virtue of the agreement alleged to have been entered into between the defendant and other manufacturers of furniture and competitors of the plaintiff, etc., the factory list prices were reduced by the allowance of freights. It appears from the exhibits which accompany the bill of exceptions that the sum demanded by and evidently allowed the plaintiff in the judgment on account of the freights paid by it is \$573.75. In our opinion, there is no legal averment on which this part of the judgment can rest. It will be remembered that after the cause was submitted the complaint was amended so as to allege that the defendant agreed to reimburse the plaintiff for the sums so paid and allowed by it, as evidenced by statements thereof.

7. This averment enlarged the scope of the complaint, so far at least as it related to the freights, and as the testimony tending to establish such facts was admitted over objection and exception, an error was committed in permitting the complaint to be amended in the respect mentioned: 1 Ency. Pl. & Pr. 585; *Mendenhall v. Harrisburg Water Co.*, 27 Or. 38 (39 Pac. 399). The allegation of the reduction of the factory list

prices in other respects by direction of the defendant to the plaintiff might, under a very liberal rule of pleading prevailing in this state (B. & C. Comp. § 85), support the view entertained by the trial court, that it was equivalent to an allegation of a modification of the original contract. Such change, however, could only be made by special agreement of the parties and not by invoking clause 7 of the contract as creating a liability.

In consequence of the error committed, to which attention has been called, we believe justice would be promoted by reversing the judgment and remanding the cause for such further proceedings as may be necessary; and hence an order to that effect will be entered.

REVERSED.

Decided 21 August, 1906.

ON MOTION FOR REHEARING.

MR. JUSTICE MOORE delivered the opinion.

A petition for a rehearing having been filed by defendant's counsel, it is asserted therein that judgment should have been rendered in this court in favor of their client for the sum of \$1,135.28, and that the cause should not be remanded for a new trial, thereby imposing additional expense upon the parties. The question now suggested was argued when the cause was submitted, in answering which it is stated in the opinion: "We believe justice would be promoted by reversing the judgment and remanding the cause for such further proceedings as may be necessary." In order to recover any of the freights claimed to have been paid by the plaintiff, it will be necessary to secure an amendment of the complaint, and, an alteration in this respect being imperative, it is quite probable that the court will, upon application, allow the complaint further to be amended, so as to aver a modification of the original contract. We adhere to the former opinion, and hence the petition will be denied.

REVERSED: REHEARING DENIED.

Decided 21 November, 1906.

ON MOTION TO RETAX COSTS.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a motion assailing the sufficiency of objections to a cost bill and to strike from the files findings made thereon. The judgment herein having been reversed, a cost bill was filed which contained a claim for the sum of \$100 paid by the defendant to the official stenographer for transcribing the notes of the testimony given at the trial. The plaintiff's counsel filed an objection to such claim on the ground that a stipulation had been entered into by the parties to the effect that the cause should be tried in this court on an abstract of record, and that the original bill of exceptions was not to be copied, but that the agreement did not provide for the payment of the expenses of transcribing such notes. The objections so filed were not verified, but an affidavit, made by plaintiff's counsel, was filed at the same time, wherein it was stated that the costs of extending the notes were divided and the defendant's part thereof was the sum so paid, and that the testimony taken was used at the argument in the lower court. Based on the issues thus made, the clerk of this court made findings of fact respecting the several items in the cost bill, but disallowed the claim for transcribing the notes, whereupon defendant's counsel filed the motion hereinbefore mentioned and an affidavit showing that it was necessary for the trial judge to examine the extended transcript of the notes because of the objections of the plaintiff's counsel to the bill of exceptions, and that the sum of \$100 was requisite and incurred in preparing the cause for appeal.

8. It is contended by defendant's counsel that the clerk of this court has no authority to make findings of fact on contested items of a cost bill or to determine the matters relating thereto, which duty devolves on the court, and hence the findings complained of should be stricken from the files. The statute originally declared that costs and disbursements should be taxed and allowed by the clerk (B. & C. Comp. § 568), and also provided that, when objections were made to a claim for costs, the party seeking to recover the sums so demanded was required, within a given time, to file with the clerk a verified statement, showing the materiality and necessity of each item (48th Or.—24)

so objected to, whereupon the clerk was required to pass upon the same and indorse upon, or append to, the verified statement the charges allowed or disallowed, and that the party aggrieved by the decision of the clerk in the allowance of the costs and disbursements might have such action reviewed by the judge in a summary manner, by filing a motion in the cause to have the costs and disbursements retaxed: B. & C. Comp. § 569. These sections have been amended so as to require the costs and disbursements to be taxed and allowed by the court or judge, but if no objections are made to the items of the cost bill the clerk is required to enter the same as a part of the judgment. If objections duly verified are filed, however, the court or judge must, without a jury, proceed to hear the issues involved, and in doing so may take relevant and competent testimony produced by either party, and thereupon determine the matter. Each party may except to the ruling of the court or judge upon the questions of law arising at such hearing and the same shall be embodied in a bill of exceptions and an appeal may be taken from such allowance and taxation: Laws 1903, p. 209. A perusal of the amendment referred to will show that its provisions are applicable only to the trial court. It may also well be doubted if the original statute was ever intended to regulate the manner of taxing costs and disbursements incurred on appeal. This court, however, has generally followed the statute thus prescribed and the practice in this respect has acquired the binding force of a tacit rule.

9. As the consideration of causes on appeal demand the time of the court, the taxation of contested claims for items of cost and disbursements has heretofore been submitted to the clerk as a referee for his determination in the first instance, subject to review upon motion by a party aggrieved by his allowance or rejection. As this practice facilitates the dispatch of business, and as the statute now in force does not apply to this court, we shall adhere to such procedure, though no formal rule to that effect has been adopted. The findings made by the clerk upon the objections to the cost bill will, therefore, not be

stricken from the files, but his action in rejecting the claim for transcribing the notes of the testimony, having been challenged by a motion, will be reviewed.

10. As a preliminary matter, the sufficiency of the objections will first be considered. The statute declares that they must be verified: Laws 1903, pp. 209, 210. The objections interposed failed technically to comply with this requirement, but there was filed at the same time a supplemental affidavit which explained the item controverted, and this, in our opinion, was a sufficient obedience to the provision of the statute.

11. The charge of \$100 for transcribing the stenographer's notes of the testimony was an expense incurred in preparing the cause for presentation to the lower court for argument, and the taxation thereof is a matter with which this court cannot intermeddle or even review unless the question has been regularly brought here by an appeal, which has not been done in this instance. The clerk, therefore, very properly disallowed the claim, and, this being so, the motion to retax is denied.

REVERSED: REHEARING DENIED.

MOTION TO RETAX COSTS DENIED.

Decided 31 July, 1906.

SHAW v. HEMPHILL.

86 Pac. 373.

JUSTICES OF THE PEACE—APPEAL—AUTHENTICATING TRANSCRIPT.

The transcript required by Section 2246, B. & C. Comp., to perfect an appeal from a justice's court to a circuit court, must be authenticated by the justice before whom the case was tried, or by some one whom he has authorized to affix his signature: *Jacobs v. Oren*, 30 Or. 593, distinguished. Unless so authenticated the transcript is void and the appeal cannot be sustained.

From Union: ROBERT EAKIN, Judge.

Statement by MR. JUSTICE MOORE.

This is an action of claim and delivery that was commenced in a justice's court of North Powder District, Union County, by William Shaw against Giles Hemphill and others, and, the cause having been tried, judgment was rendered against the

defendants as prayed for in the complaint, from which they appealed to the circuit court for that county. What purports to be a copy of the proceedings had in the justice's court and certain papers pertaining to the case were filed with the county clerk. The plaintiff's counsel moved to dismiss the appeal, on the ground that the transcript was insufficient to confer jurisdiction of the case. The motion was denied, and, the cause coming on for trial, the plaintiff declined to offer any evidence in support of the averments of his complaint, whereupon the action was dismissed, from which judgment he appeals to this court.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Charles Elmer Norton*.

For respondent there was a brief over the name of *B. F. Wilson*, with an oral argument by *Mr. Charles Harrison Carter*.

MR. JUSTICE MOORE delivered the opinion of the court.

The plaintiff's counsel, in support of the motion to dismiss the appeal, filed his affidavit to the effect that he was acquainted with the handwriting of A. C. Rollins, the justice of the peace before whom the action was originally tried; that what appears to be his signature to the pretended transcript was not subscribed by him nor by any person authorized to do so, but his name was thus appended by an attorney whose name is stated; that certain papers accompanying the alleged transcript are not the ones originally filed in the cause nor were they ever filed; that the feigned transcript fails to show that the original papers relating to the cause, and filed in the justice's court, have been attached to the written copy of the proceedings, or filed with the clerk of the circuit court; that the plaintiff could not safely go to trial on the papers filed as a transcript herein, and that such affidavit was made in good faith from the records in this case, after conversing with the justice of the peace, and with the attorney who wrote the simulated transcript. After the motion to dismiss the appeal was denied, but before the case was called for trial, plaintiff's

counsel interposed another motion for the same purpose, based on the same grounds, and also filed a supplemental affidavit in support thereof, to which was attached what purported to be a letter which he had received from the justice of the peace mentioned, in which affidavit the maker thereof states that he knows that the letter referred to was written by A. C. Rollins, who is such justice. The latter motion was also denied without any counter affidavits having been made to either motion.

The original transcript and the papers filed in the circuit court have been sent up as an exhibit in the case. An examination of these papers discloses that what purports to be the summons, the complaint, the affidavit for the delivery of the property sued for, and the plaintiff's written demand to the sheriff of that county, or to any constable therein, to take possession thereof, and the undertaking given as indemnity to such officer therefor, were fastened to a sheet of paper on the back of which are written the title of the court and cause and also the words "original complaint." As evidencing the filing thereof, the name "A. C. Rollins," as justice of the peace, is written on the back of the paper mentioned, but the handwriting does not appear to correspond with the signature to the letter which is attached to the affidavit of plaintiff's counsel. The papers adverted to, though marked "original," are evidently copies only. The summons has the name of the justice of the peace written on a slip of paper and pasted to a type-written writ, requiring the defendants to appear in the action and answer the complaint at a time stated. It would seem that the person who wrote the letter alluded to signed the name "A. C. Rollins" on the following papers: The replies, the motion to strike one of them from the files, the motion to require plaintiff to give an undertaking for costs, the affidavit in support thereof, the motion for a judgment of nonsuit, the notice of appeal, and the undertaking therefor. The transcript so objected to pretends to detail the proceedings had in the justice's court from the inception of the action until the filing of the undertaking on appeal, and concludes with a certificate

to the effect that the written copy is a true and correct transcript of the entitled cause and of the whole thereof as the same appears of record in the office and custody of the justice of the peace. The name "A. C. Rollins," as appended in attestation of the transcript, was manifestly not written by the person who subscribed his name to the letter which has been sent up to this court, and identified as the handwriting of the justice of the peace who tried the action. An inspection of that manuscript shows that Mr. Rollins does not wield a facile pen, the cause of which is not disclosed, but whatever it may be, we are aware of no reason why, under such circumstances, another person at his direction or with his knowledge and consent could not legally subscribe his name to a transcript or to evidence the filing of papers. A court will take judicial knowledge of the accession to office and of the official signatures of the principal officers of government in the judicial department of this state: B. & C. Comp. § 720, Subd. 5. Whether a justice of the peace may be regarded as a principal officer of the judicial department of whose official signature judicial knowledge will be taken without any proof thereof, is not necessary to inquire, for the validity of the signature of Rollins to the certificate appended to the transcript having been challenged by the affidavit of plaintiff's counsel in the manner indicated, it was incumbent upon the defendants to prove that the signature was genuine, or that it was made by a person who had previous authority to sign the name of the justice of the peace to the papers which were sent up to the circuit court.

The right to re-examine a judgment rendered in a justice's court is initiated by the appellant's giving within the time prescribed a notice of appeal, and an undertaking therefor, and is perfected by his causing to be filed with the clerk of the circuit court, within the period limited, a transcript of all the material entries in the justice's docket, relating to the action, and having annexed thereto all the original papers pertaining to the cause on appeal that have been filed with the justice: B. & C. Comp. §§ 2239, 2241 and 2246. As an appeal is not

perfected until the transcript has been filed, jurisdiction of the cause is not secured until there has been a compliance in this respect with the conditions which the statute imposes. A transcript on appeal is authenticated by the officer who has legal control of the papers relating to a suit or action and custody of the record of a judgment or decree which has been rendered therein. Without such verification the transcript is void and may be stricken out on motion: 2 Ency. Pl. & Pr. 285. It is therefore the certificate of a qualified justice of the peace, authenticating what purports to be a transcript of the proceedings had in an action terminating in a judgment that perfects an appeal and confers jurisdiction of the cause upon the circuit court, if the proper initiatory steps have been taken within the time prescribed by law. When a purported transcript on appeal from a judgment rendered in a justice's court is thus authenticated, the circuit court for the county in which the action was tried possesses plenary power, on suggestion of a diminution of the record, to cause any matter that has been omitted or that appears defective to be recertified so as to make what seems to be the written copy correspond with the facts, and to ascertain therefrom whether or not jurisdiction of the cause has been secured: *Jacobs v. Oren*, 30 Or. 593 (48 Pac. 431); *Hager v. Knapp*, 45 Or. 512 (78 Pac. 671). In the case at bar the validity of the certificate annexed to the pretended transcript is challenged, and a statement is made under oath that the name of the justice of the peace subscribed to such authentication was not written by him nor by any person who had authority to affix his signature thereto. No counter affidavits having been filed, the fact so stated is practically admitted, thereby conclusively showing that the circuit court never secured jurisdiction of the cause and should have dismissed the appeal. The action of the court in denying the motion to dismiss the appeal was evidently based on the decision in *Jacobs v. Oren*, 30 Or. 593 (48 Pac. 431), where it was held that jurisdiction of an appeal from a judgment rendered in a justice's court cannot be defeated by affi-

davit that the justice, in violation of his duty, failed to enter in his docket a matter material to the issue, the proper remedy in such a case being a *nunc pro tunc* order from the justice correcting the record. The holding in that case was applicable to the facts involved, but the rule thus stated cannot be universally employed. If the justice who tried the action procured another person to subscribe his name to the certificate to the transcript, he should have so stated the fact in an affidavit. Jurisdiction could have thus been established in the circuit court, which, on suggestion of a diminution of the record, could have caused the original papers pertaining to the appeal to have been brought up and such other amendments made as might be necessary to make the transcript correspond with the facts. An error having been committed by the court, the judgment is reversed, and the cause remanded, with direction to sustain the motion to dismiss the appeal, or for such other proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Decided 31 July, 1906.

SHEAK v. WILBUR.

86 Pac. 375.

LIMITATIONS—NOTES—EFFECT OF PAYMENT BY TRUSTEE IN BANKRUPTCY OF ONE SIGNER ON LIABILITY OF OTHERS.

Under Sections 24 and 25 of B. & C. Comp., providing that the statute of limitations as to an existing contract shall begin to run from the time the last payment was made, if the statute has not then run, a part payment on an existing obligation by the trustee in bankruptcy of one of the obligors extends the life of the obligation as to all the obligors.

From Union: ROBERT EAKIN, Judge.

Action by J. K. Sheak against E. J. Wilbur, M. S. Block and Ben W. Grandy. From a judgment for plaintiff, defendant Grandy appeals.

AFFIRMED.

For appellant, there was a brief over the name of *Ramsey & Oliver*, with an oral argument by *Mr. William Marion Ramsey*.

For respondent, there was a brief over the name of *Crawford & Crawford*, with an oral argument by *Mr. Thomas Harrison Crawford*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This action was commenced November 28, 1904, to recover on a promissory note executed by the defendants Wilbur, Block and Grandy on March 24, 1893, due four months after date. Wilbur was adjudged a bankrupt by the federal court in August, 1898. On the 30th of November following a payment of \$28.09 was made on the note in suit by his trustee, and the sole question for decision is whether such payment will toll the statute of limitations as to the other makers of the note. Ever since the enactment in 1623 of St. 21 Jac. 1, c. 16, placing limitations upon personal actions, which statute has been substantially adopted in many of the states of the Union, there has been great diversity of opinion, especially in this country, as to whether a payment by a joint maker of a promissory note will remove the bar of the statute as to his co-obligors. One class of cases holds that, in the absence of a statute to the contrary, "payment by one is payment for all, the one acting as agent for the rest," and serves to keep the debt alive both as to the party making the payment and his co-makers: *Whitcomb v. Whiting*, 1 Smith Lead. Cas. 703; *Id.*, 2 Doug. 652; *Cox v. Bailey*, 9 Ga. 467 (54 Am. Dec. 358); *Sigourney v. Drury*, 14 Pick. (Mass.) 387; *Cross v. Allen*, 141 U. S. 528, 535 (12 Sup. Ct. 67, 35 L. Ed. 843). And another that a part payment of an indebtedness is equivalent to a new promise to pay the residue based upon the old consideration upon which a cause of action accrues at the time of the payment and therefore binds only the person making it or one whom he is authorized to bind by a new promise to pay: *Bell v. Morrison*, 26 U. S. (1 Pet.) 351 (7 L. Ed. 174); *Cowhick v. Shingle*, 5 Wyo. 87 (37 Pac. 689, 25 L. R. A. 608, 63 Am. St. Rep. 17); *Stubblefield v. McAuliff*, 20 Wash. 442 (55 Pac. 637).

But the effect of a part payment is regulated in this State by a statute essentially different from that of any other state, except perhaps Montana: Sections 24, 25, B. & C. Comp. This statute has repeatedly been before the court for consideration, and the doctrine was early announced that the payment by a

joint maker or by his administrator will keep the debt alive as to his co-obligors, and that "whatever amounts to part payment of principal or interest on an existing contract of the kind specified, made before the limitation has expired, places the creditor in a position that he may sue on the original contract at any time during the period prescribed, counting from the time of payment": *Sutherlin v. Roberts*, 4 Or. 378; *Partlow v. Singer*, 2 Or. 307. These cases have been often cited with approval, and the doctrine therein announced steadily adhered to by this court and by the federal court: *Creighton v. Vincent*, 10 Or. 56; *Dundee Inv. Co. v. Horner*, 30 Or. 558 (48 Pac. 175); *Smith's Estate*, 43 Or. 595 (73 Pac. 336, 75 Pac. 133); *Allen v. O'Donald* (C. C.), 28 Fed. 346; *Cross v. Allen*, 141 U. S. 528 (12 Sup. Ct. 67, 35 L. Ed. 843). No distinction in principle can be made between a payment by an administrator and by a trustee in bankruptcy, and unless the doctrine which has prevailed in this State for more than a third of a century is to be now overruled, the judgment must be affirmed. The rule announced in *Partlow v. Singer* and *Sutherlin v. Roberts* has thus been acquiesced in by the legislature and the people, and if a change should now be made, it lies with the legislature and not the courts. The courts cannot always be inquiring into the original justice or wisdom of rules long established and accepted. The judgment is affirmed. **AFFIRMED.**

Argued 23 January, decided 31 July and 21 November, 1906.

OREGON v. WARNER STOCK CO.

86 Pac. 791, 87 Pac. 534.

PUBLIC LANDS—SETTLERS ON PUBLIC LANDS—RIGHTS ACQUIRED.

1. Persons who settled on vacant unsurveyed public lands of the government, not swamp lands, nor selected as swamp lands, nor otherwise reserved, with intent to acquire title under the pre-emption, homestead or timber culture laws of the United States, and filed on the lands under the government laws, did not acquire any rights under the state swamp land laws.

RIGHT OF STATE TO SUE—INTEREST OF PLAINTIFF.

2. A state, as well as an individual, must show some interest in the subject of litigation to be entitled to recognition by the courts.

This is illustrative: A state cannot maintain a suit to determine that persons claiming lands within its borders under the laws of the United

States are entitled thereto against other persons claiming under the state laws, without showing some present interest in the land.

SAME.

3. This is another illustration: A state cannot maintain a suit to cancel its patent to lands within its borders without showing some present interest in such lands.

SAME—COMPLAINT—SUFFICIENCY.

4. A complaint in a suit by a state, praying for a decree adjudging that persons who have settled on and claimed land under the pre-emption, homestead or timber culture laws are entitled thereto, in which it is alleged that the persons settled on vacant unsurveyed public lands, not swamp nor selected as swamp lands, nor otherwise reserved, with intent to acquire title under the pre-emption, homestead or timber culture laws, and that they filed on the lands under the federal laws, does not show any interest in the state in the lands essential to enable it to maintain the suit.

PLEADING—CONSTRUCTION OF ALLEGATIONS.

5. In pleadings the allegations should be direct and certain, as they will be construed generally against the pleader.

For instance: A charge that certain persons applied to purchase certain lands from the state as swamp lands, "having full notice and well knowing that none of the lands claimed was then or on the 12th day of March, 1860, swamp or overflowed land, but was then and on said 12th day of March, 1860, part of the bed of W. Lake and covered by the waters thereof," is a charge of belief on the part of the applicants, but not a charge as to the character and nature of the land itself.

APPEAL—DISPOSITION OF CAUSE AFTER AFFIRMANCE—REMANDMENTS.

6. Plaintiff brought suit for himself and others not connected with his interest, and, after the sustaining of a demurrer to his amended complaint, refused to plead further, whereupon the cause was dismissed. *Held*, that, the decree having been affirmed on appeal, the cause would not be remanded to permit plaintiff to apply for leave to amend by substituting a cause of action in his own favor only.

From Lake: HENRY L. BENSON, Judge.

Statement by MR. JUSTICE HAILEY.

The amended complaint in this case covers some 60 pages of the printed abstract and shows that this suit is brought for and on behalf of the State as plaintiff, by A. M. Crawford, Attorney-General, pursuant to the written request of the Governor, and that defendant, the Warner Valley Stock Co., a private corporation, claims to be the owner, through mesne conveyances from the United States, of a large quantity of land in Lake County, Oregon, known as "swamp land," the title to which was derived under the swamp land acts of the United States and this State, which are referred to and numerous provisions thereof set out in the amended complaint. Defendant acquired title to certain of its lands through deeds from one

R. F. McConnaughy, who derived his title from the State through mesne conveyances under the state swamp land act, and acquired title to the remainder of its lands on June 23, 1899, by direct deed to it from the State, based upon an assignment to it by mesne conveyances of a certain certificate of purchase of swamp lands issued April 23, 1884, to H. C. Owen, as assignee of all rights to purchase such lands under an application made by one W. A. Owen and four others, who had assigned their rights to him, which original application had been made by them December 2, 1870. The original application for the McConnaughy lands was made December 6, 1876, and on October 31, 1882, another application, accompanied by proofs of reclamation, for a part of the lands embraced in the original application, was filed with the State Land Board, and on January 18, 1883, a deed was issued for such land to R. F. and Martin McConnaughy; the former afterward acquiring all interest of the latter therein. The plaintiff alleges fraud and various other matters tending to avoid the rights of the defendant and its predecessors in interest in procuring patents from the State and the United States to the lands involved, and charges defendant with knowledge of all matters alleged, and particularly alleges that the lands never were and are not swamp lands, and that on December 2, 1870, when W. A. Owen and his associates made their application, they did so,

"having full notice, and well knowing and believing, that none of the land thereafter settled upon or claimed under the pre-emption, homestead or timber culture laws of the United States, hereinafter described, by the persons hereinafter named, was then, or on the 12th day of March, 1860, swamp or overflowed land, but was then and on said 12th day of March, 1860, embraced within and part of the permanent bed of Lake Warner, and covered by the waters thereof."

Also, the plaintiff charges and claims that on December 6, 1876, when the McConnaughys made their application to purchase, they did so,

"having full notice and well knowing and believing that none of said land so settled upon, or claimed under the pre-emption, homestead or timber culture laws of the United States, herein-

before mentioned and hereinafter described, was then, or on the 12th day of March, 1860, included within and part of the permanent bed of Lake Warner and covered by the waters thereof."

In 29 separate paragraphs following are set out the rights of as many separate persons in and to certain definite subdivisions of land, for the greater portion of which it is alleged defendant wrongfully and illegally procured a patent from the United States to the plaintiff, defendant's grantor. These paragraphs allege the qualifications of such persons to acquire rights upon the public lands of the United States, and the rights claimed by each, whether as pre-emption, homestead or timber culture, and allege in each case that at the time of the settlement thereon by such settler the lands were "vacant unsurveyed public lands of the United States, not mineral nor swamp, nor selected as swamp, or overflowed land, nor otherwise reserved," and were settled upon with intent to acquire title thereto under the laws of the United States as a homestead, pre-emption or timber culture claim as alleged in each case, and that afterwards, in 1887, such lands were surveyed by the United States and thrown open for settlement in the United States land office at Lakeview, Oregon, on January 15, 1889, and were filed upon by such settlers on that and other days, and filing receipts issued therefor, and that such lands have been ever since and now are occupied by such settlers; the dates of settlement ranging from July, 1879, to November 12, 1889. Patent to the State from the United States for the lands acquired by the defendant from the State was issued October 6, 1903, and delivered to defendant, and it is alleged that this patent was fraudulently obtained by the defendant falsely and fraudulently representing to the Secretary of the Interior that the land described therein was swamp land and had been duly sold and reclaimed by its grantors, and after due proof of reclamation conveyed to it by the State, and that as such grantee it was entitled to have a patent issued from the United States to the State for the land. It is also alleged that the Governor, as

Land Commissioner, protested against the issuance of such patent, on the ground that the lands were not swamp and were fraudulently obtained, and that the several persons mentioned above as having settled on the lands under the pre-emption, homestead and timber culture laws of the United States were entitled to patents therefor from the United States and deeds from the State, and that the Governor refused to accept any patent for said lands to the State of Oregon, but that notwithstanding such protest and refusal a patent was issued to the State by the Secretary of the Interior "for the greater portion of said lands so settled on, or claimed, by the several persons above named, as pre-emptions, homesteads or timber culture claims, * * and other lands," and delivered to the defendant, who had it filed and recorded in the office of the County Clerk of Lake County, Oregon, on May 10, 1904; that since the delivery of such patent to it, defendant has begun certain ejectment actions, and a suit to quiet title to certain lands claimed to have been settled by the several parties mentioned as pre-emption, homestead or timber culture claimants, and threatens to, and will unless restrained, prosecute the actions and suit already begun, and will begin other like suits and actions against other settlers mentioned to recover the lands settled upon and annul their rights to such lands:

"And because but few, if any, of said matters can be availed of as defenses at law, each and every of said persons will be much embarrassed and endangered in attempting to make any defense at law in any of said actions, and is entitled to have said several matters and things investigated and determined in a court of equity, where all said matters of defense can be fully considered and adjudged, and complete justice administered, and have said actions at law in the meantime enjoined and restrained."

A tender is made by plaintiff to pay any sum found due defendant for the purchase price of the lands patented by the plaintiff to defendant or its grantors, after deducting the profits received from the use and occupation of the lands, upon an accounting therefor and a surrender and cancellation of

said conveyances. The amended complaint then closes with the following prayer:

"Wherefore, the plaintiff prays that said sales and conveyances of said lands, and said patent from the United States, may be declared unauthorized, illegal, fraudulent and void, and decreed to be given up and canceled; that each of said persons so settling upon and claiming a tract or parcel of said lands under the pre-emption, homestead or timber culture laws of the United States, and the laws of the State of Oregon in that behalf, as aforesaid, be declared and decreed entitled to retain possession of such tract or parcel, and to conveyance of the title thereof in fee simple as against every party to this suit; that it may be decreed that said patent from the United States to the State of Oregon of the 6th day of October, 1903, was never delivered to nor accepted by the State of Oregon, the plaintiff herein, and was inoperative to pass any title or interest in any of the lands therein described to said State of Oregon, the plaintiff herein, or to the Warner Valley Stock Company, the defendant herein; that the Warner Valley Stock Company, the defendant herein, its officers, agents and servants, be restrained by an order of this court from selling, conveying or incumbering any of the lands so settled upon and claimed by the several persons above named, under the pre-emption, homestead and timber culture laws of the United States and the laws of the State of Oregon in that behalf, and from prosecuting said actions or suits against said persons or any of them, and from interfering in any manner with the possession of said several tracts or parcels of lands, or any of them, pending this suit, or until the further order of this court; and that upon the final hearing said injunction be made perpetual, and that the plaintiff recover its costs and disbursements of this suit, and may have such other and further relief as to the court may seem meet and equitable."

A general demurrer to this amended complaint, for the reason that it did not state facts sufficient to constitute a cause of suit, was sustained by the lower court, and the case dismissed by a decree from which this appeal is taken.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. Andrew Murray Crawford*, Attorney-General, *Mr. Edward Byers Watson* and *Mr. John Hicklin Hall*.

For respondent, there was a brief over the names of *Charles Amos Cogswell* and *Coover & Stapleton*, with oral arguments by *Mr. Cogswell* and *Mr. Elmer E. Coover*.

MR. JUSTICE HAILEY delivered the opinion of the court.

Plaintiff contends that there are four important questions arising upon the record to be determined upon this appeal:

(1) The right of settlers upon swamp and overflowed lands before the issuance of patent therefor, under the acts of Congress and the statutes of the state. (2) The proper construction of the act of the state legislature of October 26, 1870, providing for "the selection and sale of the swamp and overflowed lands belonging to the State of Oregon," as authorizing the disposal of lands that were, on March 12, 1860, when the grant was made to Oregon, swamp and overflowed, but had prior to the passage of said act for their disposal become dry and fit for agricultural purposes from natural causes, and without capacity to receive any benefit from artificial reclamation. (3) The sufficiency of the applications to purchase of W. A. Owen and his associates, dated November 25, 1870, and of the amended application of R. F. and Martin McConaughy of October 23, 1882, to withstand the operation of the act of October 18, 1878, in the way of forfeiture and repeal. (4) The sufficiency of the State's interest to enable it to maintain the suit. The case was ably and exhaustively argued at the hearing and is extensively treated in the briefs. We think, however, the question raised by the demurrer as to the interest of the State in the subject-matter of this suit is decisive of the case.

1. The question as to whether or not the lands involved are or were swamp lands is not before the court, as we view the complaint, hence the first three questions mentioned by the plaintiff are not to be considered, as they could arise only where the lands involved are swamp lands. The settlers upon the lands in controversy did not settle upon such lands as swamp or overflowed lands, but, as alleged in the complaint, at the date of settlement, "said lands were then and there

vacant unsurveyed public lands of the United States, not mineral nor swamp, nor selected as swamp or overflowed land, nor otherwise reserved," and were settled upon "with intent then and there to acquire title to the same under the provisions of the homestead laws of the United States" in certain cases, and in others under the pre-emption and timber culture laws of the United States. In no place is it alleged that the lands were state lands or swamp lands, or that the claimant settlers held any right thereto under the state laws or under the swamp land laws. On the contrary, it is alleged that when the lands were surveyed by the United States in 1887, and afterwards, on January 15, 1889, thrown open for settlement at the United States land office at Lakeview, they were filed upon by the claimant settlers as homestead, pre-emption and timber culture claims, and all fees paid therefor required by the United States. The settlers settled and filed upon these lands under the United States laws, recognizing no right of the State therein, and claiming that they never were swamp lands; hence it cannot be claimed that such settlers ever acquired any rights therein that would be affected by the state or national swamp land laws. Before they could invoke rights under the state swamp land laws, they would have to show that they had filed upon swamp lands; but this is expressly denied by the allegation that the lands were not "swamp lands or otherwise reserved." We therefore fail to see wherein the rights of the settlers upon swamp or overflowed lands before issuance of patent, or the construction of the state swamp land act, or the sufficiency of the applications of W. A. Owen and his associates and the other parties mentioned, could affect the result in this case, or should be further considered herein, so long as the lands involved are not alleged to have been swamp or overflowed lands.

2. The real purpose of this suit is to cancel a patent from the United States to the State for certain lands patented to the State as swamp and overflowed land, and to cancel certain other patents from the State to the defendant and its grantors (48th Or.—25)

for the same lands and prevent the defendant from asserting its title derived from the United States through the State to such land against certain settlers occupying portions of such lands as claimants under the pre-emption, homestead and timber culture laws of the United States, and to protect such settlers in their possession of such lands and confirm their rights thereto as against the plaintiff and defendant. In other words, the State, as plaintiff, is seeking to establish in the lands in controversy certain rights claimed therein by certain settlers as private individuals under the United States pre-emption, homestead and timber culture laws, and not under the State, in which lands the State has not now and never had any interest, unless, as plaintiff contends, it has title thereto as being a part of the permanent bed of a lake, which contention will be considered hereafter in this opinion. Unless the plaintiff has some interest in the land in controversy, it has no right to maintain this suit: *State ex rel. v. Shively*, 10 Or. 267; *People v. Stratton*, 25 Cal. 242; *United States v. Minor*, 114 U. S. 244 (5 Sup. Ct. 836, 29 L. Ed. 110); *United States v. San Jacinto Tin Co.*, 125 U. S. 273 (8 Sup. Ct. 850, 31 L. Ed. 747); *Lynch v. United States*, 13 Okl. 142 (73 Pac. 1095).

As stated by Mr. Justice LORD in *State ex rel. v. Shively*, 10 Or. 267, "it will hardly be asserted, if the subject-matter of the allegation concerns the rights of private parties only and exclusively, and the State has no direct interest in the prosecution or result of the suit, that State interference in such controversies ought not to be countenanced or tolerated, either directly or upon the relation of private parties. When a remedy is provided, either at law or in equity, complete and adequate, by which matters in dispute between private parties may be adjusted and settled, that remedy must be pursued by them. The state cannot lend the power of its name, or invidiously assume and champion the cause of one private citizen against another, for the purpose of settling rights or titles in controversy between them, when each and all citizens are equally entitled to its protection." In that case the state, on the relation of certain parties

claiming to be the owners of the equitable title of a certain block of land in which the state had no interest, brought suit to have the defendant, Shively, who held the legal title to said land, declared a trustee thereof for the benefit of the relators, and have him transfer the legal title to them, and, in deciding it, it was held that "no right of the state is affected, either directly or indirectly, nor is any matter of public concern involved, by which, under particular circumstances, a right of action or suit exists in the state, or the state is authorized or induced to act as a party, or upon the relation of some private person for the enforcement or protection of such public interest. The matter, exhibited by the facts is wholly and entirely a controversy between private individuals, for which a complete and adequate remedy exists in equity, in a suit between them." This doctrine is also recognized in the other cases cited above. The question, then, in this case, is whether or not the complaint alleges any interest in the lands in controversy in the plaintiff, and the case is, so far as the effort to establish the rights of the claimant settlers to the land is concerned, entirely within the principle of the case of *State ex rel. v. Shively*, 10 Or. 267.

3. Plaintiff, however, contends that the case has a two-fold aspect, and, if the prayer to confirm the interests of the claimant settlers should be denied, the prayer for the cancellation of the patents from plaintiff to defendant and its grantors should be granted, and establish the title to the lands in controversy in the plaintiff under its right thereto as a part of the permanent bed of the lake; but this contention also depends upon the plaintiff having some interest in the lands in controversy, and is within the principle declared in the cases cited.

4. The lands in controversy in this suit, as shown by the complaint and the statements of the plaintiff's counsel in their brief, are the lands settled upon by the various claimant settlers under the pre-emption, homestead and timber culture laws of the United States, and it is only these lands, if any, that are referred to as having been embraced in the permanent bed of Lake Warner, and hence by reason thereof belonged to the state,

and it is these lands only that are sought to be affected by any decree to be entered herein. It is alleged, however, that these lands at the time of the settlement thereon by the various settlers were "vacant unsurveyed public lands of the United States, not mineral nor swamp, nor selected as swamp or overflowed land, nor otherwise reserved." The claimants must, therefore, have acquired their settlement rights thereto as such vacant lands, and afterwards filed thereon under the United States laws, when the lands had been surveyed and thrown open for settlement by the United States. Conceding, but not deciding, that Lake Warner, by reason of the meander thereof, as claimed by plaintiff, is presumed to have been a navigable lake when the lands in controversy formed a part of its permanent bed, and that title to such lands vested in the state, there is no allegation that any other lands included in the patents sought to be canceled were embraced in the bed of such lake, and consequently such other lands are not involved herein, and the title thereto did not belong to the state, for they were not a part of the bed of the lake, and no benefit could come to the plaintiff from having the patents canceled for such other lands. Neither could any benefit accrue to the plaintiff from cancellation of the United States patent and its own patents to the defendant and its grantors, and decreeing a conveyance from it and defendant to the claimant settlers of the lands in controversy. The only benefit it could derive from this suit, if any, would be the cancellation of its patents to the defendant and its grantors, and decreeing the title to the lands in controversy to be in the plaintiff as a part of the permanent bed of Lake Warner.

5. The presumption invoked by the plaintiff that Lake Warner was a navigable lake, and therefore title to the lands in controversy embraced in its bed vested in the plaintiff, is based entirely upon the allegations of the plaintiff regarding the character of the lands in controversy at the time W. A. Owen and his associates and the McConnaughys made applications to purchase such lands under the swamp land act and prior thereto.

These allegations are that the applicants, at the time they made their applications, did so,

"having full notice, and well knowing and believing, that none of the lands thereafter settled upon or claimed under the pre-emption, homestead or timber culture laws of the United States, hereinafter described, by the persons hereinafter named, was then, or on the 12th day of March, 1860, swamp or overflowed land, but was then, and on said 12th day of March, 1860, embraced within and part of the permanent bed of Lake Warner and covered by the waters thereof."

These allegations only go to the fact of the notice, knowledge and belief of the applicants as to the character of the lands and not to the fact of the character of the lands at that time. They do not charge the fact that such lands were then a part of the bed of the lake, but only that these applicants made their applications having full notice, and well knowing and believing, that they were a part of the bed of the lake. Denial of such notice, knowledge or belief on the part of the applicants would be a denial of the allegations contained in this complaint, but not a denial of the condition of the lands at that time. But, giving to these allegations all that is contended for them by the plaintiff, they are clearly negatived by the further, later and repeated allegations that at the time of the settlement upon the lands in controversy, they were vacant unsurveyed public lands, and not swamp lands, nor otherwise reserved, and were thereafter surveyed and filed upon as public lands of the United States, clearly showing that the plaintiff has no interest therein.

Construing the complaint in its entirety, we think it fails to allege any interest in the plaintiff in the lands in controversy. The plaintiff, therefore, having no interest in the lands in controversy, it could not, either upon the relation of the Attorney-General or otherwise, lend the power of its name to adjust a controversy between private parties, and this is clearly the object of this suit, as is shown by the latter part of paragraph 47 of the complaint, wherein it is alleged:

"And because but few, if any, of said matters can be availed of as defenses at law, each and every of said persons will be

much embarrassed and endangered in attempting to make any defense at law in any of said actions, and is entitled to have said several matters and things investigated and determined in a court of equity, where all said matters of defence can be fully considered and adjudged, and complete justice administered, and have said actions at law in the meantime enjoined and restrained."

This allegation on the part of plaintiff expressly recognizes the right of the settlers to have their matters adjusted in a court of equity, and such being the case, as is clearly shown by the authorities heretofore cited, and the state having no interest in the lands in controversy, the decree of the lower court should be affirmed; and it is so ordered.

AFFIRMED.

Decided 21 November, 1906.

ON MOTION TO REMAND.

MR. JUSTICE HAILEY delivered the opinion of the court.

6. The demurrer to the amended complaint having been sustained on appeal, and the decree of the lower court dismissing this case affirmed, plaintiff filed a motion to have the case remanded, with leave to apply to the court below to amend its complaint, so as to show its interest in certain of the lands mentioned therein and its right to equitable relief in the cancellation of deeds therefor to the defendant. In support of this motion plaintiff cites *Powell v. Dayton, S. & G. R. R. Co.*, 14 Or. 22 (12 Pac. 83), in which the overruling of a demurrer to a complaint was sustained, and this court refused to grant leave to answer over, but remanded the cause for further proceedings, and announced as a rule of practice in such cases "that when this court does not make a final disposition of a cause, but remands the same to the court below, it will be open for that court to determine in the first instance whether the defendant shall be permitted to answer or not." This rule, however, is not applicable to the case at bar where the appellant seeks to have the cause remanded, with leave to apply to amend, and by so doing substitute a cause of suit in its own favor only for the original cause of suit, which was for the benefit of others not connected with plaintiff's interest. *Fowle v. House*,

30 Or. 305 (47 Pac. 787), is also cited, in which a decree sustaining a demurrer to a complaint was affirmed, and the cause remanded "for such further proceedings as may be deemed proper, not inconsistent with the opinion herein," and a motion was denied to recall the mandate and amend the decree, so as to allow the plaintiff to amend his complaint. The court in that case held that it is for the lower court to determine in the first instance whether a plaintiff shall be allowed to amend his complaint, and that this court should not interfere with the exercise of its discretion by directing what course it should pursue in the matter. It is suggested in the motion that every objection to the sufficiency of the complaint can be obviated by the amendment, and the delay and expense of bringing a new suit thereby avoided. This, however, is not a matter which this court can consider, and should have been acted on by the plaintiff in the lower court, as the interest of the plaintiff in the lands in controversy was one of the questions raised by the demurrer. Plaintiff, however, refused to plead further, and stood upon its amended complaint, and it is now too late to complain of its own action in that respect.

The motion to remand, with leave to apply to amend, will therefore be denied. **AFFIRMED: MOTION DENIED.**

Decided 21 August, 1906.

MINE SUPPLY CO. v. COLUMBIA MINING CO.

86 Pac. 798.

SALES—IMPLIED WARRANTY.

1. In the case of a sale for a particular purpose, where the buyer has no opportunity to inspect, but relies upon the judgment of the seller, there is an implied warranty that the article sold shall be reasonably suitable for the purpose intended; but where a stated article is ordered, the only warranty is that the one furnished will be of the kind ordered, even though it is known to the seller that the buyer intends to use the article for a special purpose.

For instance: A dealer having contracted to sell a machine called a "latest improved Huntington mill" for reducing ores, does not impliedly warrant that such mill will successfully reduce the ores of the mine at which it is to be used, though the seller knew the mill was being bought for that purpose; but he does impliedly warrant that the mill delivered shall be just the kind ordered, and there is a breach of the contract if an old style mill is furnished instead of the "latest improved."

SALES—WAIVER OF CLAIM OF DAMAGES FOR BREACH OF WARRANTY.

2. Retaining an article and endeavoring to use it, though it is not as contracted for, is not a waiver of a claim for damages for a breach of the contract of sale.

SALES—MEASURE OF DAMAGES FOR BREACH.

3. Where a seller delivers goods not of the kind or quality agreed upon, but they are accepted, the measure of the buyer's damages is the difference in value between the goods ordered and those delivered.

SALES—BREACH OF WARRANTY—ELEMENTS OF DAMAGE.

4. In case of a breach of a contract to furnish a specified kind of mill for reducing ores, where the mill has been retained, the buyer may recover as damages the expense incurred in testing the mill, the freight paid on imperfect parts that were not used, the cost of providing new parts necessary to make the mill conform to the contract, if the seller refuses or neglects to furnish them, the value of gold lost while testing the machinery, and the amount of wages paid the employees while idle on account of the defective mill.

SALES—PROVISIONS OF CONTRACT—BREACH.

5. The provisions in a contract of sale for the benefit of the seller are available to him only when he has complied with the contract, and cannot be relied upon for his protection after he has failed in performance.

From Baker: SAMUEL WHITE, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by the Mine & Smelter Supply Co. against the Columbia Gold Mining Co. The plaintiff is a dealer in mining machinery and supplies at Denver, Colo., and the defendant is a mining corporation in Baker County, in this state. In August, 1904, the plaintiff was advised that the defendant desired to remodel and enlarge its mill and mining plant, and thereupon sent an agent to sell to it such machinery and appliances as it might need. After looking over the mine, and being informed by the defendant's officers of the character of ore to be reduced, and that it contemplated the removal of ten stamps from its mill and the substitution of another kind of crushing machinery or mill therefor, prepared a list of machinery and appliances, including "one latest improved five-foot Huntington mill," which, on behalf of the plaintiff, he agreed to sell and the defendant agreed to purchase for the aggregate sum of \$3,450, f. o. b. Denver, \$450 of which was to be paid with the order, \$1,000 when the goods arrived at Sumpter, the railroad station nearest the mine, and \$2,000 within 30 days thereafter. The contract was in writing, and among other things stipulated that the plaintiff assumed

"no liability for damages on account of delays; nor can we make any allowance for repairs or alterations unless same are made with our written consent. It is agreed that no liability shall attach to us on account of damages or delays caused by such repairs or alterations."

The defendant began immediately to remove the old machinery and to make preparation for the reception and installation of the new, but it was not shipped in time to reach Sumpter until about the 28th of October, when the \$1,000 payment was made as agreed upon, and the machinery taken to the mine and set up. A part of the machinery was satisfactory, but the Huntington mill, as defendant alleges, was not of the "latest improved," and was so defectively constructed that it could not be successfully operated. After it had been set up and the defects discovered, plaintiff was advised thereof and sent its manager to the mine, who, upon an examination of the mill, admitted that it was imperfectly constructed and agreed to replace the defective parts with new ones, which was done, but the defendant says they were no more satisfactory than the original. Plaintiff was again notified, and sent an expert machinist to ascertain the difficulty and to remedy the same; but, according to defendant's theory, he was unable to do so, and it was compelled to and did finally supply the defective parts by purchasing from another house. It refused to pay the balance due on the contract, and this action was commenced to recover the same. The defendant seeks to set off against the contract price the damages sustained by reason of the alleged breach of the contract. It had judgment in the court below, and the plaintiff appeals, assigning error in the admission of testimony and the giving and refusal of certain instructions.

REVERSED.

For appellant there was a brief over the names of *Albert Backus*, *George S. Reed* and *George Stidger*, with an oral argument by *Mr. Backus*.

For respondent there was a brief and an oral argument by *Mr. John Langdon Rand*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

It is unnecessary to notice the several assignments of error in detail. They involve substantially two questions: (1) Whether there was an implied warranty on the part of the plaintiff that the Huntington mill sold by it to defendant would successfully reduce the ores of defendant's mine, and was fit and proper for the purpose intended; and (2) the measure of damages, if there was a breach of the contract by plaintiff.

1. There was no express warranty of the character or capacity of the mill, but the court instructed the jury that, if plaintiff was aware of the purpose for which it was to be used by the defendant, the law implies a warranty that it should be suitable and fit for that purpose, and, if it was not, defendant is entitled to offset against the purchase price any damages it may have suffered on account of a breach of such warranty. We do not understand such to be the law. Where one contracts or agrees to supply an article to be applied or used for a particular purpose, and the buyer has no opportunity of inspection, but relies upon the judgment and skill of the seller, and not his own, there is an implied warranty that the article shall be reasonably fit and suitable for the purpose intended: *Morse v. Union Stock Yard Co.* 21 Or. 289 (28 Pac. 2, 14 L. R. A. 157); *Gold Ridge Min. Co. v. Tallmadge*, 44 Or. 34 (74 Pac. 325, 102 Am. St. Rep. 602). But where, as in this case, a known and described article is ordered, there is no implied warranty of its fitness, if it is actually furnished, although the seller was advised that it was intended for a special purpose. If the purchaser gets the article he buys, and buys that which he gets, he takes the risk of its suitability for the intended purpose, unless there is an express warranty: 2 Mechem, Sales, § 1314; Benjamin, Sales (Bennett's 6 ed.), 644; *Lukens v. Freiund*, 27 Kan. 664 (51 Am. Rep. 429); *Goulds v. Brophy*, 42 Minn. 109 (43 N. W. 834, 6 L. R. A. 392). There is, however, in the latter case, an implied warranty that the article delivered or furnished complies with the description: 2 Mechem, Sales, § 1334.

The mill which plaintiff agreed to sell to the defendant was described as the "latest improved Huntington mill." This was a specific article of a known and recognized description among persons dealing in mining machinery, and, if the mill furnished by the plaintiff conformed to the description and was of the kind and character ordered, there was no implied warranty that it would answer the purposes of the defendant, and the plaintiff is not liable for damages on that account. But if, as the defendant alleges and the testimony tended to show, the mill furnished was not the "latest improved," but an old-style mill, there was a breach of the contract, for which the plaintiff is liable in damages: *Steiger v. Fronhofer*, 43 Or. 178 (72 Pac. 693); *Lenz v. Blake*, 44 Or. 569 (76 Pac. 356).

2. The fact that it made an effort to use and operate the mill was not a waiver of its right to damages for such breach: *Norton v. Dreyfuss*, 106 N. Y. 90 (12 N. E. 428); *Northwest Cordage Co. v. Rice*, 5 N. D. 432 (67 N. W. 298, 57 Am. St. Rep. 563).

3. The ordinary rule in a case of this kind is that the measure of damages is the difference in the value of the goods ordered and those furnished and accepted: 2 Mechem, Sales, § 1817; *Dean Pump Works v. Astoria Iron Works*, 40 Or. 83 (66 Pac. 605); *Schumann v. Wager*, 36 Or. 65 (58 Pac. 770).

4. But there may be special circumstances which will enhance the damages, such as if it was known to the seller that the article was intended for a particular purpose, in which case the vendee will be entitled to recover such damages as he may have sustained as the direct and proximate result of the breach: 2 Mechem, Sales, § 1771. Thus, in the case of a breach of a warranty on the sale of an engine to be used in elevating grain at a warehouse, the vendee may recover the expenses incurred in putting up the engine, employing men and teams preparatory to the operation of the warehouse, and damages for the injury done by the elements to grain which he was unable to handle because of the insufficiency of the engine: *Drake v. Sears*, 8 Or. 209. And so in this case, the mill having been

purchased by the defendant under the circumstances disclosed by the testimony, the plaintiff is liable for any loss defendant may have sustained as the natural and proximate result of the breach of the contract, if the mill furnished was not of the kind ordered. And, in estimating the damages, the expenses and labor incurred in testing the mill, freight paid on imperfect parts furnished by the plaintiff, but which could not be used, the cost of providing new parts necessary to make the mill conform to the contract, if plaintiff refused or neglected to supply them, loss of free gold while testing the mill, the wages paid the mine crew while idle on account of the defective mill, and the like, may be considered, but no loss incurred by reason of the delay of the plaintiff in shipping the mill at the time alleged to have been agreed upon. The contract expressly stipulated that plaintiff should not be liable for damages on that account.

5. There is also a provision in the contract that the plaintiff should not be responsible for repairs or alterations unless made with its written consent, nor liable for damages on account of delays caused by such repairs or alterations. This stipulation can only apply in case plaintiff complied with its contract. If it did not furnish a mill of the kind and description specified in the contract, and defendant was damaged by reason thereof, it cannot shield itself from liability behind a stipulation in a contract with which it did not comply.

This, we think, substantially disposes of all the questions argued on this appeal. Judgment reversed and new trial ordered.

REVERSED.

Argued 11 July, decided 11 September, 1906.

STATE v. SHOREY.

86 Pac. 331.

CONSTITUTIONAL LAW—REGULATION OF CHILD LABOR.

1. The right of the state, under the police power, to regulate parental control of minors, and the right of minors to contract and be contracted with, is not restricted by the Fourteenth Amendment to the Constitution of the United States, forbidding the deprivation of life, liberty or property without due process of law, or by Const. Or. Art I, § 1, declaring that all

men are equal in rights under a social compact. Under the police power the state has a very wide discretion in prohibiting child labor, even where there is no danger to morals, decency, life or limb.

CONSTITUTIONALITY OF LAWS LIMITING RIGHT OF ADULT MALES TO CONTRACT FOR THEIR LABOR.

2. The constitutionality of laws prohibiting the employment of adult males for more than a stated number of hours per day is referred to but not decided.

REGULATION OF HOURS OF CHILD LABOR.

3. Gen. Laws 1905, p. 343, § 5, prohibiting the employment of any child under 16 years of age for a longer period than 10 hours in any one day is not unconstitutional as a deprivation of liberty or property without due process of law, or as an infringement on the equal rights of citizens.

From Multnomah: ALFRED F. SEARS, JR., Judge.

John F. Shorey appeals from a conviction for violating the child labor law of 1905, by employing a messenger boy less than 16 years old more than ten hours in one day. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Mr. William Torbert Muir*.

For the State there was a brief over the names of *A. M. Crawford*, Attorney-General; *John Manning*, District Attorney, and *Bert Emory Haney*, with an oral argument by *Mr. Haney*.

MR. JUSTICE BEAN delivered the opinion of the court.

The defendant was accused by information of the crime of employing a minor under the age of 16 years for a greater period than 10 hours a day, in violation of Section 5 of the child labor law of 1905, which reads as follows:

"No child under sixteen years of age shall be employed at any work before the hour of seven in the morning, or after the hour of six at night, nor employed for longer than ten hours for any one day, nor more than six days in any one week; and every such child, under sixteen years of age, shall be entitled to not less than thirty minutes for meal time at noon, but such meal time shall not be included as part of the work hours of the day; and every employer shall post in a conspicuous place where such minors are employed, a printed notice stating the maximum work hours required in one week and in every day of the week, from such minors." Gen. Laws. 1905, p. 343.

1. A demurrer to the information was overruled, and he entered a plea of not guilty. Upon the trial it was stipulated that

the averments of the information were true, and he was thereupon adjudged guilty and sentenced to pay a fine and costs. From this judgment he appeals, claiming that the law which he is accused of violating is unconstitutional and void because in conflict with the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall "deprive any person of life, liberty or property without due process of law," and of Section 1 of Article I of the Constitution of Oregon, which reads:

"We declare that all men, when they form a social compact, are equal in rights."

These constitutional provisions do not limit the power of the state to interfere with the parental control of minors, or to regulate the right of a minor to contract, or of others to contract with him: 2 Tiedeman, State & Fed. Con. § 195. It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best interest, although the prohibited employment does not involve a direct danger to morals, decency, or of life or limb. Such legislation is not an unlawful interference with the parents' control over the child or right to its labor, nor with the liberty of the child: *People v. Ewer*, 141 N. Y. 129 (36 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788), affirming *In re Ewer*, 70 Hun. 239 (24 N. Y. Supp. 500).

2. Laws prohibiting the employment of adult males for more than a stated number of hours per day or week are not valid unless reasonably necessary to protect the public health, safety, morals or general welfare, because the right to labor or employ labor on such terms as may be agreed upon is a liberty or property right guaranteed to such persons by the Fourteenth Amendment to the Constitution of the United States and with which the state cannot interfere: *Lochner v. New York*, 198 U. S. 45 (25 Sup. Ct. 539, 49 L. Ed. 937). But laws regulating the right of minors to contract do not come within this principle. They are not *sui juris* and can only contract to a limited extent. They are wards of the state and subject to its control. As to them, the state stands in the position of *parens*

patriae, and may exercise unlimited supervision and control over their contracts, occupation and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health and morals of its future citizens. "It has been well remarked," says Mr. Justice GRAY in *People v. Ewer*, 141 N. Y. 129 (25 L. R. A., 794, 38 Am. St. Rep. 788, 36 N. E. 4), "that the better organized and trained the race, the better it is prepared for holding its own. Hence it is that laws are enacted looking to the compulsory education by parents of their children, and to their punishment for cruel treatment; and which limit and regulate the employment of children in the factory and the workshop to prevent injury from excessive labor. It is not and cannot be disputed that the interest which the state has in the physical, moral and intellectual well-being of its members warrants the implication, and the exercise, of every just power, which will result in preparing the child, in future life, to support itself, to serve the state and in all the relations and duties of adult life to perform well and capably its part."

The supervision and control of minors is a subject which has always been regarded as within the province of legislative authority. How far it shall be exercised is a question of expediency and propriety which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with the legislature's judgment on that subject, unless perhaps, its enactments are so manifestly unreasonable and arbitrary as to be invalid on that account. It is not a question of constitutional power. "The constitutional guaranty of the liberty of contract," says Mr. Tiedeman, "does not, therefore, necessarily cover their [minors'] cases, and prevent such legislation for their protection. So far as such regulations control and limit the powers of minors to contract for labor, there has never been, and never can be, any question as to their constitutionality. Minors are the wards of the nation, and even the control of them by parents is subject to the unlimited supervisory control of the state": 1 Tiedeman, *State & Fed. Con.* p.

335. And Mr. Freund, in his work on Police Powers, says: "The constitutionality of legislation for the protection of children or minors is rarely questioned; and the legislature is conceded a wide discretion in creating restraints." And: "Even the courts which take a very liberal view of individual liberty and are inclined to condemn paternal legislation would concede that such paternal control may be exercised over children, so especially in the choice of occupations, hours of labor, payment of wages, and everything pertaining to education, and in these matters a wide and constantly expanding legislative activity is exercised": Freund, Police Power, § 259.

3. We are of the opinion, therefore, that the law prohibiting the employment of a child under 16 years of age for longer than 10 hours in any one day is a valid exercise of legislative power. It is argued, however, that the provisions of the statute forbidding the employment of such a child at any work before the hour of 7 in the morning or after the hour of 6 at night, is so manifestly unreasonable and arbitrary as to be void on that account. The defendant is not accused nor was he convicted of violating this provision of the statute, and is therefore not in a position to raise the question suggested.

It follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

Argued 31 July, decided 11 Sept. 1906; rehearing denied 28 January, 1907.

GUILLAUME v. K. S. D. LAND CO.

86 Pac. 883, 88 Pac. 586.

SPECIFIC PERFORMANCE—NECESSITY AND SUFFICIENCY OF TENDER.

1. Where the vendee in a contract for the sale of land has deposited in court the money tendered, his withdrawal of the same before trial precludes a decree for specific performance in his favor, unless some act of the vendor relieves the vendee from the necessity of a tender.

DENIAL OF LIABILITY AS AFFECTING NEED OF TENDER.

2. Where the vendee in a contract for the sale of land has the right to pay any part of the consideration in commissions for selling other lands of the vendor, the vendor's denial of liability for the commissions earned by the vendee is equivalent to a refusal to execute a deed for the land specified, and hence the vendee is not obliged to make a tender of the balance as a condition precedent to a suit for specific performance.

CORPORATIONS—AUTHORITY OF DIRECTOR OR STOCKHOLDER AS AGENT.

3. The act or declaration of a director or stockholder of a corporation,

acting in his personal capacity, does not bind the corporation, unless he is the agent of the corporation as to that matter, or his conduct is ratified.

CORPORATE AGENCY—CONDUCT AMOUNTING TO RATIFICATION.

4. The conduct of a corporation in refusing to pay the claim of one with whom it had a contract and defending a suit brought to enforce such claim is a ratification of the act of one of its stockholders or directors in denying liability on the contract.

VENDOR AND PURCHASER—CONSTRUCTION OF CONTRACT TO SELL.

5. A written proposal from a corporation owning lands to plaintiff, to sell him a certain block for a specified sum, to be paid for in cash or in commissions "on sales" effected by plaintiff, "it is all to be paid for in either cash or commissions within three years from the date hereof, * * you to obtain purchasers for such of our lands as we place at your disposal * * this agreement to sell to others, except, yourself, to remain in force for 12 months," is unambiguous, and not susceptible of the construction that plaintiff was required to sell all the corporation's land in order to entitle him to a deed of the block in question.

SPECIFIC PERFORMANCE—SUFFICIENCY OF DESCRIPTION IN CONTRACT.

6. A contract for the sale of land referring to it as a certain block, as designated on a map on file in the vendor's office, and possession being delivered to the purchaser, is sufficiently definite to enable a surveyor to locate on the ground the block as surveyed, though the plat was not recorded, and hence is sufficient to sustain a decree for specific performance.

COSTS AND DISBURSEMENTS IN EQUITY.

7. Under Section 566, B. & C. Comp., the costs and disbursements in an equity suit may be assessed against defendant in all the courts through which the case has passed.

From Malheur: GEORGE E. DAVIS, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by L. F. Guillaume against the K. S. D. Fruit Land Company to enforce the specific performance of a contract to convey real property. The complaint alleges in effect, (1) that at all times mentioned therein the defendant was and now is a private corporation; (2) that, being the owner in fee of a large body of land in township 19 south, range 47 east of the Willamette Meridian, the defendant caused it to be surveyed into blocks of 40 acres each, which "were duly numbered and designated on an official map which is and at all times has been by said corporation defendant recognized as the official map of its holdings in Malheur County, State of Oregon"; (3) that on January 15, 1900, the defendant sold one of these subdivisions to the plaintiff, who accepted its written offer which was addressed to him, setting out a copy thereof, from which (48th Or.—26)

the following extracts are taken, as being the only provisions thought to be applicable herein, to wit:

"The undersigned hereby propose to sell you a block of their land at Arcadia, designated on a map as number 'sixteen (16)' which said map is now on file at our office in Arcadia, and is recognized by us as the official and true map of our holdings, for the sum of sixteen hundred dollars (\$1600.00), to be paid for as follows, to wit: First, in commissions amounting to ten (10) per cent on sales effected by you; secondly, in cash, should the aforesaid commissions fall short of paying for the land. It is all to be paid for in either cash or commissions within three years from date hereof, it being understood that you, in this, agree to obtain purchasers for our company for the sale of such of our lands as we place at your disposal. * * This agreement to sell to others, except yourself, to remain in force for 12 months."

It is further averred that the plaintiff duly performed his part of the contract and effected sales of such land, aggregating \$3,860, for which he is entitled to a commission of \$386, to be credited on the purchase of block No. 16; that on January 14, 1903, he tendered the remainder of the consideration for such block to the defendant and requested a conveyance thereof, but it refused to comply therewith, whereupon the money so due was deposited in court for it, to be paid on the execution of a good and sufficient deed for the premises; and that plaintiff has no plain, speedy or adequate remedy at law.

The answer specifically denies each allegation of the complaint, except paragraphs 1, 2 and 3 thereof, and avers that the plaintiff did not obtain purchasers for all the land placed at his disposal, and that he did not try to sell all such lands. The testimony was taken before referees, and, having been submitted to the court, findings of fact were made as stated in the complaint, except that on January 14, 1903, the plaintiff called at the defendant's office, in the absence of its manager, and tendered to its employes the sum of \$1,240, requesting the execution of a deed to the premises; that when this suit was instituted the plaintiff left with the clerk of the court a certificate of deposit for \$1,240, which was designed as a tender of the remainder of the purchase price of block No. 16, but

that such voucher was soon thereafter withdrawn, and at the time of the trial no money was on deposit in the court for such purpose.

Further findings were made as follows:

"(9) That the lands referred to in said agreement are described as being 'block 16' of defendant's lands at Arcadia, as numbered on a private unrecorded map referred to in the complaint, and as remaining in the possession of defendant as vendor.

"(10) That from the description referred to in said agreement, it is impossible to determine the location of said lands, as the same is indefinite and uncertain, and not sufficiently described to enable the court to enter a decree herein with sufficient certainty to in any manner settle the rights between the parties hereto regarding the lands claimed in the complaint."

Based on these findings, the suit was dismissed and plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Edmund Mills Wolfe* and *Richard Cunningham*, with an oral argument by *Mr. Wolfe*.

For respondent there was a brief over the names of *William Rufus King* and *William H. Brooke*, with an oral argument by *Mr. King*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. An examination of the transcript shows that the court's findings in respect to the alleged tender of the remainder of the purchase price of the block and the withdrawal of the certificate of deposit are fully supported by the testimony. Unless by some act of the defendant the plaintiff was relieved from the necessity of tendering the remainder of the purchase price, his failure to permit the certificate of deposit to remain with the clerk of the court, assuming it was sufficient for that purpose, must defeat his right to the relief sought.

2. The testimony discloses that, prior to the expiration of the three years specified in the agreement, the plaintiff received from one of the directors of the defendant a letter in answer to a request for a settlement of his commissions, as follows:

"Ogden, Utah, Jan. 7, 1903.

Rev. L. F. Guillaume,
Ontario, Or.:

Dear Sir:—

You are not entitled to anything, as you did not fulfill your part of the contract.

Yours truly, K. S. & D. CO.

We, on the contrary, have a claim on you because of your abrupt departure."

F. J. Kiesel, as defendant's witness, testified on cross-examination that he wrote this letter, but that on reflection he concluded he ought not to have signed the defendant's name thereto, saying he was only a director, and not an officer, of the corporation. As the commissions earned by the plaintiff formed a part of the consideration for the purchase of the block of land, a denial of any sum due him on account thereof is tantamount to a refusal to execute to him a deed to the premises at the price specified; and, this being so, the question to be considered is whether or not the defendant was bound by the statements contained in such letter.

3. A corporation is represented by its officers, and a director thereof in his individual right possesses no authority to act for it unless he has been appointed its agent, or his acts and declarations have been ratified by it: *Hartford Bank v. Hart*, 3 Day (Conn.) 491 (3 Am. Dec. 274).

4. As the directors of a corporation, when duly assembled, may constitute one of their number an agent of the artificial being to transact a particular part of the business in which it is engaged, so, too, they can ratify any act of one of their number that they could have authorized in the first instance: *Merrick v. Reynolds Engine & G. Co.*, 101 Mass. 381; *Lyndon Mill Co. v. Lyndon Literary & B. Inst.*, 63 Vt. 581 (22 Atl. 575, 25 Am. St. Rep. 783). The transcript does not show that Kiesel was appointed the defendant's agent, nor does it appear that any testimony was produced directly proving that the declarations contained in his letter were ratified. The defendant evidently derived a benefit by the sales of its land which the plaintiff negotiated, and it was liable to him for the com-

missions which he thereby earned. The corporation had knowledge of the plaintiff's demands when a copy of the complaint was served, and thereafter retaining the commissions and setting up the defense interposed were equivalent to a ratification of Kisel's declaration, as much so as if it had given the notice that it did not owe the plaintiff anything. The rules of law do not require the performance of vain things, and as the defendant would not have accepted the remainder of the purchase price of the block as a consideration for the execution of the deed, the plaintiff was not obliged to make a tender thereof as a condition precedent to his right to a decree for specific performance: *Pomeroy, Contracts*, § 326; *Waterman, Spec. Perf.* § 446.

5. The cause having been tried before a referee, testimony was introduced, over objection and exception, to the effect that the plaintiff was required to sell all the defendant's land, about 1,200 acres, before he was entitled to a deed to block No. 16. An examination of the parts of the agreement hereinbefore set out will show that no ambiguity exists therein in relation to this question, and that the omission of the word "all" preceding the phrase "such of our lands as we place at your disposal," shows that the contract is not susceptible to the construction sought to be placed upon it. The defendant's written proposal, when accepted by the plaintiff, gave him 12 months in which to secure purchasers for such lands for which he was to receive 10 per cent of the sums so secured, but he was to have three years in which to pay the remainder of the purchase price of the block selected. There was no ambiguity in the contract in respect to the consideration which the plaintiff was to pay for the block specified, nor any stipulation that he would secure purchasers for all the land that the defendant desired to sell, and any testimony to the contrary was inadmissible as tending to vary the terms of the written agreement.

6. What has been said in relation to the plaintiff's obligation to obtain purchasers for the defendant's land will apply to the averment in the answer that he did not try to sell all such

real property. Reading the contract in connection with the admissions of the answer, it will be seen that block No. 16 of the defendant's land in Arcadia, as designated on a map on file in its office at that place, and recognized by it as the official and true map of its holdings, is situated in township 19 south, range 47 east of the Willamette Meridian in Malheur County, Oregon, and, by the survey thereof, contains 40 acres. These facts having been admitted by the pleadings, very little testimony was offered in relation to the identity of the land specified. The plaintiff as a witness in his own behalf, however, stated that possession of the block was given to him, and that he thereafter leased the premises to the manager of the defendant corporation. The rule is quite general that if the description clause of real property as stated in a written instrument is vague, the construction of the language used that has been placed upon it by the parties may be shown by parol evidence as tending to identify the premises intended: *Lanman v. Crooker*, 97 Ind. 163 (49 Am. Rep. 437); *Truett v. Adams*, 66 Cal. 218 (5 Pac. 96); *Lovejoy v. Lovett*, 124 Mass. 270. Thus, when possession of real property is taken pursuant to an agreement of the vendor, the occupation of the premises by the vendee may render certain what otherwise would have been a vague description of the land intended by the parties: *Richards v. Snider*, 11 Or. 197 (3 Pac. 177); *Simpson v. Blaisdell*, 85 Me. 199 (27 Atl. 101, 35 Am. St. Rep. 348); *Ray v. Pease*, 95 Ga. 153 (22 S. E. 190).

It is admitted by the defendant's counsel that when a map delineating a survey of real property is referred to in a deed, such plat is to be considered as a part of the instrument, and to be construed in connection therewith; but it is contended that the reference must be to a public chart, and as the allusion in the case at bar is to a private map in the office of the defendant corporation, the rule adverted to is not applicable. In *Noonan v. Lee*, 67 U. S. (2 Black) 499 (17 L. Ed. 278), reference was made in a deed to a plat that was so defective as not entitled to be recorded. In deciding the case, Mr. Justice

SWAYNE says: "The proof in the case shows clearly where the plat was in fact located. As regards the statute, the plat was fatally defective, and afforded no warrant to the recording officer for putting it on record. Nevertheless, its being there was a fact, and whether there or elsewhere, the reference to it in a deed for the purpose of fixing a boundary is sufficient." In *Young v. Cosgrove*, 83 Iowa 632 (49 N. W. 1040), in referring to an invalid map alluded to in a deed, the court says: "The holder of the title to the land recognized the plat by following its descriptions, and thus, as between himself and his grantee, adopted it. Surely, when an instrument is referred to to designate land, or give description thereof, we are not required to hold such an instrument valid and regular in order to accept the description it gives. A void deed or a void plat could well describe lands which could be properly and conveniently referred to for such description in deeds conveying them." In *Johnstone v. Scott*, 11 Mich. 232, it was held that deeds of town lots were valid, notwithstanding the failure of the proprietors to acknowledge and record the town plat. In deciding that case, Mr. Justice CHRISTIANCY says: "None of our statutes in reference to town plats go so far as to render deeds of conveyance between individuals void, because made by reference to an unacknowledged or unrecorded plat. But any such plat, or any other map or plat, whether to be found in a public office or in the possession of any person, may still be used for the purpose of identifying the land intended to be conveyed, though no description be given except by reference to such plat by which the property conveyed could be ascertained."

We think there can be no doubt that the reference to the defendant's official map on file in its office at Arcadia, and proof of the identity of the land, the possession of which was delivered to the plaintiff, afford sufficient data to enable a competent surveyor to locate block No. 16 as it was surveyed on the ground, and this being so, the decree is reversed, and one will be entered here as prayed for in the complaint, provided that the plaintiff deposit with the clerk of the lower court, within 30 days from the entry of the mandate therein, the sum

of \$1,214, the remainder of the purchase price due the defendant.

7. The plaintiff will recover his costs and disbursements in both courts.

REVERSED.

Decided 29 January, 1907.

ON MOTION FOR REHEARING.

MR. JUSTICE MOORE delivered the opinion of the court.

In a petition for a rehearing, filed herein, attention is directed to a misstatement of fact in the former opinion to the effect that the plaintiff received a letter, setting out a copy thereof, from a director of the corporation, instead of from a stockholder thereof. No distinction, however, was made between a director and a stockholder as to the right of either to bind a corporation by his unauthorized act, and any inadvertence in the use of the word mentioned was immaterial. The only legal principle involved of which we entertained a doubt, was the right of F. J. Kiesel, a stockholder of the defendant, to bind the corporation by a letter purporting to have been written by it, denying all liability for commissions alleged to have been earned by the plaintiff, thereby excusing the latter from making a tender of the sum of money admitted to be due the defendant as the remainder of the consideration for the land. The plaintiff, as a witness in his own behalf, testified that the contract whereby the real property in question was stipulated to be sold and conveyed to him, though signed by the president and secretary of the defendant, was dictated by Kiesel, and that in order to secure a settlement of his demand he wrote to such stockholder, because he considered him as the principal interested in the company. As a witness for the defendant, Kiesel testified that he never was manager of the company, but, as he owned one third of the stock, he was consulted at the time the contract was drawn up, because he was so heavily interested in the corporation. We think it is fairly inferable from the testimony that Kiesel was the agent of, and authorized to act for, the corporation in writing the letter to plaintiff, upon the faith of which he acted; and, this being so, the petition is denied.

REVERSED: REHEARING DENIED.

Argued 10 July, decided 23 October, 1906.

HANLEY v. COMBS.

87 Pac. 143.

MONEY RECEIVED—BREACH OF CONTRACT TO SELL—PLEADING OFFER TO PERFORM BY PLAINTIFF.

1. In an action to recover money paid on a contract that has been repudiated, as money received to the use of plaintiff, no offer of performance or declaration of readiness to perform is necessary.

MONEY RECEIVED—ATTACHMENT—IMPLIED CONTRACT.

2. An action to recover money paid on a contract that the other party afterward repudiated is in form an action of *assumpsit* and the legal liability to repay is an implied contract for the direct payment of money, under B. & C. Comp. § 296, subd. 1.

SALES—RIGHT OF RESCISSION BY SELLER FOR FAULT OF BUYER—RECOVERY OF MONEY PAID IN PART PERFORMANCE.

3. In general terms it may be stated that one who has paid money in part performance of a contract which he subsequently refuses to complete, the other party being willing to comply on his part, cannot recover the sum so paid, but it is a rule subject to very many exceptions and the particular facts will largely influence the decision. If, however, the subsequent refusal to perform does not go to the entire contract in effect, then the seller must perform and recoup his loss through an action for damages, or return the consideration.

IDEM.

4. Where the purchaser of a number of articles agrees to determine their quality before delivery and acceptance, the mere refusal to pass articles offered which in fact were up to the required standard, if honestly done, is not such a substantial abandonment of the contract as to justify a rescission by the seller, whatever may be the liability of the purchaser in damages for violating his agreement to buy.

SALES—RESCISSION BY PURCHASER—QUESTION FOR JURY.

5. In such a case it is for the jury to determine whether the conduct of the buyer was a refusal to comply with the terms of the contract, subjecting him to damages, or was such an abandonment of the contract as to justify the seller in rescinding it and forfeiting the payment already made.

SALES—ERRONEOUS INSTRUCTION AS TO DELIVERY.

6. An instruction imposing on a party to a contract in litigation a condition not included therein is so erroneous as to be reversible; as, instructing that the purchaser in a contract of sale is under obligation to accept the property at another place than the one named in the writing.

COMPETENCY OF EVIDENCE—RES INTER ALIOS ACTA.

7. Evidence of transactions between a seller of property and a third person concerning the subject of sale, not in the presence or hearing of the buyer, are not competent evidence against him, being acts between strangers by which he ought not to be injured.

For instance: Where, under a contract to sell a certain number of articles, the buyer was to satisfy himself as to the quality of those offered, evidence that about the time the purchaser began his inspection the seller arranged with a third person to let the purchaser select from his stock also, if necessary, in order to get the required number, is incompetent, in the absence of a showing that the purchaser knew of the arrangement, since it was not a transaction in which the buyer was concerned.

WAIVER OF OBJECTION TO PERFORMANCE OF CONTRACT.

8. A party to a contract should state any objections he may have at the time performance is tendered, and such objections as can then be made must be made or they will be considered waived.

For instance: A contractor for the purchase of a stated number of articles who made no objection that the total number was not tendered him for examination, cannot afterward claim a breach of the contract because the seller did not offer for inspection the entire number he agreed to sell; that objection was waived by not making it at the time of the inspection.

From Grant: **GEORGE E. DAVIS, Judge.**

Statement by **MR. CHIEF JUSTICE BEAN.**

This is an action by The William Hanley Co., a private corporation, against J. D. Combs to recover \$3,300 advanced by the plaintiff on an executory contract for the sale of personal property. The complaint alleges that on August 2, 1905, the plaintiff and defendant entered into the following written contract:

"This Agreement, entered into this 2d day of August, 1905, by and between J. D. Combs, of John Day, Or., and Wm. Hanley, Mgr., of Burns, Ore., for and in consideration of thirty-three hundred dollars (\$3,300.00) and further consideration hereinafter stated, that the said J. D. Combs sells to Wm. Hanley, Mgr., 600 head of three and four year old steers, now in Bear Valley and vicinity, at \$2.65 per hundred, delivered and weighed at Baker City, Or., on or about 1st day of September, 1905, cattle to be taken off feed and water at six o'clock in the morning and weighed at two o'clock evening, it is further agreed that said cattle shall be passed as to quality, in Bear Valley, before starting, and that no thin-fleshed or rough cattle, or Holstein or Jersey blood shall be accepted.

J. D. Combs.

Wm. Hanley, Mgr."

It further alleges that under and by virtue of the terms of this contract the plaintiff advanced and paid to the defendant \$3,300 on account of the purchase price of the cattle mentioned and referred to therein; but that defendant has wholly failed, neglected and absolutely refused to deliver the cattle or any part thereof at Baker City or elsewhere, or at all; that plaintiff has demanded a repayment to it of the moneys so advanced, which has been refused. The complaint prays for judgment for such amount, with interest from the commencement of the action.

The answer admits the making of the contract set out in the complaint and the payment of the money by the plaintiff, and affirmatively alleges that on August 20, 1905, the defendant tendered to the plaintiff at Bear Valley 600 head of cattle of the kind and quality specified in the contract for the purpose of being passed as to quality, but that plaintiff, without cause, failed, neglected and refused to pass such cattle or any part thereof, except 222 head, whereupon defendant elected to rescind the contract and thereafter sold and disposed of the cattle to other parties. The reply put in issue the new matter alleged in the answer.

After the commencement of the action a writ of attachment was sued out by the plaintiff and certain personal property seized by virtue thereof, but on motion of the defendant the attachment was dissolved. A trial was thereafter had and a verdict rendered in favor of the defendant. From the judgment entered on such verdict plaintiff appeals, complaining that the court erred in dissolving the attachment, in the giving of certain instructions to the jury, and in the admission of evidence.

REVERSED.

For appellant there was a brief over the name of *Butcher, Clifford & Correll*, with oral arguments by *Mr. William Fontaine Butcher* and *Mr. Morton D. Clifford*.

For respondent there was a brief over the name of *Cattanach & Wood*, with an oral argument by *Mr. Wells Warrington Wood*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The argument in support of the motion to dissolve the attachment is that the complaint does not state facts sufficient to constitute a cause of action, because it does not allege that the plaintiff was ready, willing and able to perform the contract on its part, or that it tendered or offered to pay the balance of the purchase price. This is not an action for a breach of the contract between the plaintiff and defendant. It is an action to recover back money paid by the plaintiff thereon as money had and received by the defendant for its use, on the ground that the contract has been wrongfully and unlawfully rescinded

and put an end to by the defendant. In such an action the plaintiff is not required to allege or prove an offer of performance on its part, nor readiness to perform, whatever might be the rule in an action to recover damages for a breach of the contract: *Main v. King*, 8 Barb. 535; *Monroe v. Reynolds*, 47 Barb. 574. If one of the parties to a contract wrongfully refuses to comply therewith, the other party, if not himself in fault, may elect to treat the contract as rescinded and recover back the consideration, or whatever else has been paid thereon: Bishop, Contracts, § 834. And he is not obliged to allege or prove a tender or offer to perform the rescinded contract.

2. An action to recover back the money paid on a contract which has been wrongfully rescinded is in form assumpsit, and is on an implied contract within the meaning of the attachment laws of this State: 2 Enc. Pl. & Pr. 1016; *S. C. V. Peat Fuel Co. v. Tuck*, 53 Cal. 304. The complaint therefore states a cause of action, and the motion to dissolve the attachment should have been denied.

The record discloses that on August 20, 1905, the plaintiff's manager, William Hanley, and the defendant met by agreement in Bear Valley for the purpose of passing upon the quality of the cattle to be subsequently delivered by the defendant to the plaintiff at Baker City in pursuance of the written contract; that defendant had at the time and place stated a band of 578 head of cattle which he offered to Hanley for the purpose of having him pass upon the quality; that after Hanley looked the band over he selected therefrom some 200 or 250 head as complying with the contract and such as he would be willing to accept when delivered, but the defendant, being dissatisfied with the manner in which Hanley was cutting the cattle, notified him that he would refuse to be further bound by the contract, and subsequently sold the cattle to other parties, and never delivered or offered to deliver to plaintiff any cattle whatever under the contract in question. There is much testimony in the record as to what was said and done by the respective parties at the time the cattle were offered by defendant to plaintiff for the purpose of having them passed as to whether they were of the

kind and quality called for by the contract, but this testimony is unimportant on this appeal. The question for trial was whether Hanley's acts and conduct amounted to a repudiation or abandonment of the contract, and the evidence in question was important as bearing on that question, but its weight and value were for the jury.

3. Upon this point the court instructed the jury:

"If you should find from a preponderance of the evidence that at any stage of the passing upon the cattle in question the plaintiff refused to pass and accept a three or four year old steer which was not in fact thin flesh or rough or Holstein or Jersey blood, the defendant had the right to refuse any other or greater number of cattle for plaintiff's inspection, and that it would amount to a repudiation of the agreement on the part of the plaintiff."

And the court further instructed:

"If you should find that the defendant had at any place in Bear Valley at the time agreed upon 600 head of cattle of the kind, age and quality required, and was ready, able and willing to furnish them to the plaintiff to be then and there passed and accepted by it, and the plaintiff refused to pass and accept 278 head or any less number of such cattle, then the plaintiff made breach of and repudiated the agreement, and that in that case it is not entitled to recover back any part of the money advanced by it upon the agreement."

By these instructions the jury were told in effect that the refusal of Hanley, the plaintiff's manager, to pass and accept any one animal which, in their opinion, the evidence showed to be of the kind and quality specified in the contract would be such a repudiation of the contract by the plaintiff as would defeat a recovery in this action; but this is not the law. The rule is unquestioned that a party who has advanced money in part performance of a contract, and then refused to proceed to its ultimate conclusion, the other party being ready and willing to perform on his part, will not be permitted to recover back what he has advanced: *Ketchum v. Evertson*, 13 Johns. 359 (7 Am. Dec. 384); *Hansbrough v. Peck*, 72 U. S. (5 Wall.) 497 (18 L. Ed. 520); *Gibbons v. Hayden*, 3 Kan. App. 38 (44 Pac. 445); *Neis v. O'Brien*, 12 Wash. 358 (41 Pac. 59, 50 Am. St.

Rep. 894); *Walter v. Reed*, 34 Neb. 544 (52 N. W. 682). But it is not every breach that will amount to such a repudiation or authorize the other party to rescind the contract and retain what has been paid or advanced thereon. The nature of each case must be considered, and, as Mr. Bishop says, it is probably impossible to state a rule applicable to all the varying facts. After quoting from some of the decisions he says: "In general terms, the doctrine is that the breach, to justify a rescission, must be of a dependant covenant, or willful, or in a substantial part comprehending the root of the whole:" Bishop, *Contracts* (En. Ed.), § 828. And if the breach by a vendee be not of such a character as to amount to a repudiation of the contract or a refusal to proceed to its ultimate conclusion, and the seller, without a demand or offer to perform and without notice to the vendee, disposes of the subject of the contract, the latter may treat it as a wrongful rescission, and the law will give him a right of action to recover back the consideration paid in part performance: *Monroe v. Reynolds*, 47 Barb. 574; *Fancher v. Goodman*, 29 Barb. 315; *Raymond v. Bearnard*, 12 Johns. 274 (7 Am. Dec. 371).

4. Now, in this case, the cattle which defendant agreed to sell and deliver to the plaintiff were to be passed as to quality in Bear Valley before being driven to Baker City for final delivery. It was the duty of the plaintiff to comply in good faith with this part of the contract, and if by words, or by their equivalent in acts, it refused to do so, the defendant could lawfully rescind. But before he could treat the contract as at an end, dispose of the property to other parties and keep the \$3,300 advanced thereon by the plaintiff, it must appear that the plaintiff's words, acts or conduct were willful or amounted to a repudiation or abandonment of the contract "in some substantial part, comprehending the whole." The mere refusal to pass cattle which in fact complied with the contract, if done in good faith, would not of itself amount to such a repudiation, and would not justify the defendant in rescinding the contract, although it might render plaintiff liable in damages for a breach thereof. The case turns upon the question whether the plain-

tiff abandoned or repudiated the contract, or, in other words, refused to proceed to its ultimate conclusion, and not whether its agent may have been mistaken in his judgment as to the quality of some of the cattle offered to him by the defendant for passing, or whether he may have been unnecessarily exacting in his requirements as to quality.

5. The case should have been submitted to the jury upon this theory, leaving them to find from the entire testimony whether plaintiff's acts and conduct amounted in effect to an abandonment or repudiation of the contract or a refusal to comply with its terms. The instructions as given were erroneous because they did not conform to this principle.

6. These instructions and others given by the court were also erroneous because they imposed the duty upon plaintiff, not only to pass the cattle as to quality in Bear Valley, but to accept them at that place, while the contract expressly provides that the cattle shall be delivered, accepted and paid for at Baker City. They were to be passed as to quality only in Bear Valley, and no acceptance was contemplated until final delivery.

7. The defendant was permitted to prove on the trial, over plaintiff's objection and exception, that about the time the plaintiff's manager began inspecting the cattle in Bear Valley he made arrangements with one Brown to turn in on his contract with plaintiff 150 head belonging to Brown if necessary. This evidence was, we think, under the circumstances, incompetent. The plaintiff was not informed of the arrangement between defendant and Brown, nor was it advised that the Brown cattle were to be considered as a part of the number which the defendant agreed to sell to it, nor was any such cattle offered to it for passing as to quality. The arrangement was wholly between Brown and the defendant, and had no connection with the contract in question.

8. Moreover, no objection was made by plaintiff to passing upon the cattle offered because the entire number was not tendered at the time, nor did it refuse to proceed with the contract on that account. It therefore cannot now claim that the defendant did not comply with his contract because he did not offer

for passing at the time the entire number of cattle which he agreed to deliver at Baker City.

Judgment reversed, and new trial ordered. REVERSED.

Argued 12 July, decided 23 October, 1906; rehearing denied January, 1907.

STATE v. WHITE.

87 Pac. 137.

INDICTMENT—CONJUNCTIVE CHARGE NOT DUPLICITOUS UNLESS THE ACTS CHARGED ARE REPUGNANT.

1. Under the rule established in this state that an information may conjunctively charge acts disjunctively enumerated in a statute, an information charging that defendant forcibly seized, confined, inveigled and kidnapped another is sufficient under Section 1774, B. & C. Comp., subjecting to punishment every person who without lawful authority forcibly seizes and confines another, or inveigles or kidnaps another, with intent to send him out of the state against his will. All the acts charged may be committed in a single kidnapping, since no one is repugnant to any of the others.

RIGHT OF JUDGE TO DISCHARGE ACCEPTED JUROR FOR CAUSE.

2. A trial judge is in duty bound to see that an impartial jury is selected, and to that end he may excuse persons who have been accepted by both sides, if in his judgment they ought not to serve, and for reasons not named in the statute, the discretion thus exercised being subject to review.

DISCHARGING JURORS BY COURT—PEREMPTORY CHALLENGES.

3. The right of peremptory challenge is one of rejection and not of selection, and the fact that a judge sua sponte, over objection and after a party has exhausted his peremptory rights, excuses a juror who has been accepted by both parties, does not constitute error, since the party aggrieved is not thereby deprived of a challenge, and he has no right to insist that any particular juror shall serve.

CRIMINAL LAW—INCIDENTAL EVIDENCE OF OTHER CRIMES.

4. Evidence of other offenses than the one charged is not on that ground incompetent if it is sufficiently connected with the charge under investigation, the jury being properly instructed as to the purpose for which it may be considered.

For instance: In a prosecution for kidnapping, where the jury are instructed at defendant's request that he is not charged with enticing seamen and that he cannot be found guilty of such offense, he is not prejudiced by evidence tending to prove that crime as part of the kidnapping.

WITNESSES—IMPEACHMENT—PARTICULAR WRONGFUL ACTS.

5. Under B. & C. Comp. §852, providing that a witness may not be impeached by evidence of particular wrongful acts, testimony regarding the desertion of certain witnesses from a ship is inadmissible.

CRIMINAL LAW—EVIDENCE—EXPERTS—COMPETENCY.

6. A witness, who has been a practicing physician and surgeon for 17 years, and who has described a person's bodily condition, may give his opinion as an expert as to the cause of such condition: *State v. Simons*, 39 Or. 114, distinguished.

HEARSAY EVIDENCE—HARMLESS ERROR.

7. Error in admitting hearsay evidence is harmless where the same information is given by other witnesses without objection.

For instance: In a prosecution for kidnapping, the refusal to strike out as hearsay testimony of the person kidnapped as to what third persons said defendant had stated to them is not prejudicial to defendant, where one of such third persons testifies to what defendant told them and it is substantially the same as the hearsay testimony.

SAME—FURTHER ILLUSTRATION.

8. In a prosecution for kidnapping a seaman, statements by a third person as to what defendant said he would do to the prosecuting witness if he attempted to board a certain ship were properly admitted over objection that defendant did not hear them, where it is shown defendant heard the important statements, though he did not hear the preliminary conversation, and afterward made practically the same statements.

EVIDENCE OF CO-CONSPIRATORS—COMPETENCY—PROOF OF CONSPIRACY.

9. Evidence of acts done by alleged conspirators in pursuance of the alleged conspiracy may be admitted before the existence of such unlawful agreement is entirely established, the order of proof being in the discretion of the trial judge. If the judge shall finally consider the showing as to the conspiracy insufficient, he should strike out the evidence of specific acts and instruct the jury to disregard it.

CRIMINAL LAW—WITNESSES—PROPRIETY OF DISCHARGING CODEFENDANTS TO TESTIFY FOR DEFENDANT.

10. The court exercised its discretion wisely in declining to discharge the codefendants under Section 1397, B. & C. Comp., that they might become witnesses for the defendant, since there was sufficient testimony to justify bringing them both to trial.

CRIMINAL LAW—INSTRUCTION AS TO INFERENCE FROM FAILURE OF CODEFENDANT TO TESTIFY.

11. It is not obligatory on a trial judge, under Section 1397, B. & C. Comp., to instruct a jury in a criminal case that no unfavorable inference is to be drawn from the fact that a codefendant not on trial fails to testify for the defendant.

From Multnomah. ARTHUR L. FRAZER, Judge.

Statement by MR. JUSTICE HAILEY.

This is a prosecution for kidnapping against James White and others. In February, 1903, the defendants were partners in conducting a sailor boarding house in Portland, Oregon, and also engaged in furnishing crews to vessels in that port. On the 11th of that month the prosecuting witness, Buren, a sailor, and two sailor friends, Cyren and Pearson, were in Portland, but were not staying at the boarding house of the defendants. In the forenoon of that day they went to the British consul's office and signed shipping articles with the ship Riversdale, then at anchor on the east side of the Willamette River. As they were going away from the office of the consul, the defend-

(48th Or.—27)

ants Harry White and Smith, and one Jack Grant, who was also interested in the sailor boarding house business and in furnishing crews for ships, in which latter transactions he pro-rated with the defendants, were all seen standing on a corner opposite the consul's office, and Harry White was seen to walk rapidly away down Third street. This occurred about 11 o'clock in the forenoon. Shortly afterwards these sailors met Grant and Harry White, and in answer to an inquiry told them that they, the sailors, had signed with the Riversdale, and Grant then told them to keep away from the ship, and Cyren says: "He told us that three or four times, to keep away from the ship. Harry White heard that" and also that "the two White brothers had said that they would give us a good thrashing if we went on that ship," and that Harry White was there when Grant made the last statement. About half an hour later Cyren and Pearson again met Grant and Harry White, when White said, as testified by Cyren: "He was going to give us ——— if we went on that ship. He said we had no business to sign on her, because we were not in their house—not any of their boarding houses. He said we did not belong to their ships." After noon of that day the three sailors, Buren, Cyren, and Pearson, hired an express wagon to haul their "gear," as one of them termed his baggage, to the dock where the ship Riversdale was lying, and as they approached the dock, walking ahead of the express wagon, James White was seen there in company with three sailors, who immediately set upon them and knocked Buren down and trampled him, and assaulted and threw stones at Cyren and Pearson, who succeeded in escaping to the ship. During the trouble White stood by and told the assailants to "give him hell, boys." After Buren had been beaten, kicked, jumped upon and generally misused, White ordered the assaulting sailors to put him in the express wagon, and had him taken to the defendant's boarding house. When defendant reached the house, Buren was there sitting in a chair, and Harry White and Smith, the other defendants, were there also, and also the three assaulting sailors, who had come from the dock. One of the White brothers paid the expressman for hauling

Buren to the house. Buren was given a drink of whisky by one of the White brothers—he did not know which—and then was taken upstairs and put to bed by their order.

Testifying as to what occurred afterwards, Buren said:

"I got another whisky up there, but do not know who brought it. * * A little before dark that same night James White came to the room and asked me if I could go to Vancouver. I told him I was sick and could not go; and they said they would see about it in the morning if I was better. He said the policemen were looking for me, and the detectives would put me in jail and take me aboard that ship when it was ready to go, and I would be safer in Vancouver. * * It was after the whisky had been brought to me in the bedroom. While I was upstairs in the bedroom my stomach and head were in bad condition. * * I was sick at my stomach and had to lay down on my back, as I had to throw up when I laid down on my side. I did not take any medicine except a little white capsule the housekeeper gave me, and he gave me some whisky afterwards."

And then, speaking about going to Vancouver, witness testified:

"A fellow came up and told me to put my clothes on, we have to go to Vancouver. He said, 'A policeman will soon be up here in the house.' I said, 'I am sick. It is bad for me to go over there.' * * They told me to be quick that the policeman would soon be there. * * Smith was on the outside once when I saw out in the door. He was standing there when I was ready, and we went downstairs. Billy Smith handed me a bottle of whisky, and told me to use it if I felt weak and sick. * * When we came to Woodlawn, we had to wait there a while for a Vancouver car. When the Vancouver car came they brought me in it. * * When we came over to the ferry, Jim White came against the stair. * * When Jim White came down to the ferry he asked me how I felt, and I told him I felt sick, and he said we might go and have a bath, and he brought me up to the barber shop there. * * Jim White told this fellow in the shop to make the bath ready and make it as hot as possible. * * And then he says, 'I will go up in town and get a room for you. I will be back in a few minutes.'"

Then, after testifying about White taking him to a hotel and getting him a room, he said:

"He brought me to bed and asked me if I wanted to have anything to eat * * and went away, * * and then came back * * and asked me how I felt and something more—I cannot

remember all—and then when he went away again he told me to put on the iron bolt inside of the door, to lock the door with the bolt. 'I will call your name and knock on the door when I come up again,' he said. * * When Jim White told me to lock the door he said something about letting nobody come in, but I can't exactly say what it was."

When asked why he went to Vancouver, he said: "They brought me over there. I could not go myself." And, when asked if he desired to go to Vancouver, Buren answered, "I could not say 'no.' I was afraid of the sailors; they were drunk." He also testified that he was taken to Vancouver in the afternoon, and the defendant James White met him at the ferry there, and White says he first saw Buren in Vancouver between 3 and 4 o'clock in the afternoon. Between 2 and 3 o'clock, and after Buren had been taken from the boarding house by two sailors whom he did not know, and one of whom accompanied him to Vancouver and left him after the defendant James White had taken him to the barber shop, the harbor master, Biglin, called at defendants' boarding house and asked Harry White where Buren was, and White said he had gone to California. That night the defendant was arrested in Vancouver, and the next day the other defendants were present in Buren's room in Vancouver when the harbor master, Biglin, and other persons were there questioning Buren. Later an information was filed against defendants jointly for the crime of kidnapping the prosecuting witness, Buren. Upon separate trial of the defendant James White, he was convicted, and appealed from the judgment of conviction to this court, and alleges numerous assignments of error.

AFFIRMED.

For appellant there was a brief over the names of *Dan J. Malarkey* and *Pipes & Tift*, with an oral argument by *Mr. Martin Luther Pipes*.

For the state there was a brief over the names of *A. M. Crawford*, Attorney General; *John Manning*, District Attorney, and *Robert Graves Morrow*, *A. C. Spencer* and *W. T. Hume*, with an oral argument by *Mr. Morrow*.

MR. JUSTICE HAILEY delivered the opinion of the court:

1. The information was filed under Section 1774, B. & C. Comp., and charged that defendants did, without lawful, or any, authority, unlawfully and feloniously and forcibly seize, confine, inveigle and kidnap one C. A. Buren, with the intent of them, the said defendants, unlawfully and feloniously to cause him, the said Buren, against his will, to be sent out of the State of Oregon and into the State of Washington. A demurrer was filed to the information, but the only ground urged at the hearing was that it charged more than one crime, "in that it charges that the defendants did forcibly seize and confine and did inveigle and kidnap one C. A. Buren." The defendant contends that there are two kinds of kidnapping under our statute—the one forcible, by seizing and confining, the other fraudulent, by inveigling—and that they are so different as to be repugnant to each other, and each constitutes a separate and distinct crime, though defined in and prohibited by the same section of the Code and punished in the same way.

Section 1774, B. & C. Comp., provides:

"Every person who without lawful authority forcibly seizes and confines another, or inveigles or kidnaps another, with intent * * to cause such other person to be sent out of this state against his will shall be punished," etc.

This court has repeatedly held that where a statute makes it a crime to do either of several acts stated disjunctively therein, all of such acts may be embraced in one count, using the conjunction "and" where "or" occurs in the statute: *State v. Carr*, 6 Or. 133; *State v. Bergman*, 6 Or. 341; *State v. Dale*, 8 Or. 229; *State v. Humphreys*, 43 Or. 47 (70 Pac. 824); *Cranor v. Albany*, 43 Or. 147 (71 Pac. 1042). Under this rule the commission of any one or all of the acts named in this statute constitutes only one crime, that of kidnapping. We fail to see wherein the acts charged are so different in character as to be repugnant to each other, but, on the contrary, think that the crime charged could have been committed by doing any one or all of the acts alleged. Our belief in this respect is fully sustained by the evidence in this case, which clearly shows that after Buren had been cruelly assaulted and beaten into submission by thugs under the evident control of the defendant he

was taken to the boarding house of defendants and there confined in a room and later inveigled to go to Vancouver, Washington, by the fraudulent representation that he would be arrested by officers if he failed to do so, thus showing that both the forcible and fraudulent acts of the statute could be consistently performed in committing the crime of kidnapping. The demurrer was properly overruled.

2. After 10 jurors had been accepted, but not sworn, and after the defendant had exhausted all his peremptory challenges, upon leave of the court the prosecution further examined a certain juror who had already been accepted by both parties as to his qualifications, and learned that he was related to one of the counsel for defendant and distantly connected by marriage with the defendant. In answer to a question as to whether or not the fact of this relationship would affect him in the trial of the case or cause him to be influenced in rendering his verdict, the juror said:

"No; it would not, although I go into the case at a disadvantage at the present time, as long as the question has been brought up. Yet I might have an honest opinion in his favor under the evidence that I might not have had when I went in the case. I feel that, if I had my way, I would sooner be let off."

He was then asked:

"And you think that the investigation having been opened you would be embarrassed so you would not be able to do the defendant justice?"

To this he replied, "I would like to do every one justice." The court then said, "You would prefer to be excused and not serve on this jury?" To which he answered, "Yes, sir..". The court on its own motion, and over the objection of the defendant, then excused the juror. After three more jurors had been accepted by both parties, at his own request to be excused from serving on the jury, an accepted juror, W. S. Drake, was excused by the court, who used the following language:

"I think I will excuse Mr. Drake. He has a case assigned for tomorrow morning. We will hardly finish this case today. The jury may be out all night and Mr. Drake would not be in condition to conduct his own case tomorrow.. You may call another juror."

After the juror Drake had been excused, another juror was called and examined as to his qualifications by defendant's counsel, and defendant, after such examination, asked leave to challenge such juror peremptorily, which leave was refused and defendant then peremptorily challenged the juror, but the challenge was denied for the reason that defendant had already exhausted his peremptory challenges, and exceptions were duly saved by defendant. The jury was then sworn and the cause tried. Error is assigned in excusing the two jurors after the defendant had exhausted his peremptory challenges and in denying his peremptory challenge to the last juror.

In *Kumli v. Southern Pacific Co.* 21 Or. 510 (28 Pac. 637) speaking of the determination of the competency of a juror, Mr. Justice BEAN says: "The determination of his competency, therefore, necessarily becomes primarily a question for the trial court, keeping ever in view, as it should, that the ultimate object to be attained is a trial by a fair and impartial jury. The question is wisely left largely to the sound discretion of that court, and its findings upon a challenge to a juror for actual bias, where there is any reasonable question as to his competency, ought not to be reviewed by an appellate court unless it clearly appear that such discretion has been arbitrarily exercised." It is the duty of the trial judge to see that a fair and impartial jury is obtained, and he may in the exercise of a sound discretion, and before the jury is complete, excuse incompetent and disqualified jurors, although no challenge or objection has been interposed and for causes not enumerated in the statute: *Commonwealth v. Livermore*, 4 Gray, 19; *Atlas Min. Co. v. Johnston*, 23 Mich. 36; *People v. Carrier*, 46 Mich. 444 (9 N. W. 487); *People v. Thacker*, 108 Mich. 658 (66 N. W. 562); *People v. Arceo*, 32 Cal. 40; *Sutton v. Fox*, 55 Wis. 536 (13 N. W. 477, 42 Am. Rep. 744). The reasons for excusing these jurors appear upon the record, and we see no abuse of the discretion lodged in the court in such matters.

In *State v. Boon*, 80 N. C. 462, a juror accepted by the defendant afterwards stated that he was related to both the deceased and the defendant and requested to be excused, and

the action of the court in directing him to stand aside was sustained upon appeal. In *People v. Carrier*, 46 Mich. 444 (9 N. W. 487), the juror was qualified, and had been accepted by both parties, but after stating to the court that he was in attendance on court as a witness in the next case to be tried, he was excused over the objection of the defendant, and the action of the court approved on appeal. In *Atlas Min. Co. v. Johnston*, 23 Mich. 36, under a statute providing that "the twelve first persons who shall appear as their names are drawn and called, and shall be approved as indifferent between the parties, shall be sworn, and shall be the jury to try the cause," the court, in commenting upon the meaning of this statute, said: "We think within the fair meaning of this statute, when compared with the other provisions in reference to jurors and read in the light of the decisions, that the first two jurors may properly be said not to have been approved as indifferent between the parties. And, though it would be ground of error for the court to admit a juror who is challenged and ought to have been rejected, it is no ground of error for the court to be more cautious and strict in securing an impartial jury than the law actually required, and that for this purpose the court may very properly reject a juror on a ground which would not be strictly sufficient to sustain a challenge for cause, or, in other words, when the refusal to sustain the challenge would not constitute error. So long as an impartial jury is obtained, neither party has a right to complain of this course by the court; and especially when, as in this case, no objection was taken by either party to the competency or impartiality of the jury which was obtained." In the foregoing case no challenge or objection was taken by either party to either of the two jurors excused, and they were not subject to challenge under the statute, and it was claimed by the defendant that he was entitled as a matter of right to have the case tried by the 12 jurors whose names were first drawn from the box, but the court held otherwise.

3. The only question, then, is, did the court abuse its discretion by excusing these jurors after the defendant had exhausted his peremptory challenges? In *O'Neil v. Lake Superior Iron*

Co. 67 Mich. 560 (35 N. W. 162), after the plaintiff had exhausted his peremptory challenges, a juror who had been previously examined and not rejected by the plaintiff requested to be excused for the reason that he did not think he had sufficient understanding of the English language to qualify him to sit as a juror, and the court excused him over the objection of plaintiff, who objected on the ground that he had already exhausted his peremptory challenges and consequently some person would be drawn instead of the juror against whom he would be debarred from exercising his privilege of peremptory challenge. The court said: "The fact that the party had exhausted his peremptory challenges before the juror was excused invaded no right of the plaintiff. * * Peremptory challenges are exercised by a party, not in the selection of jurors, but in rejection. It is not aimed at disqualification, but is exercised upon qualified jurors as matter of favor to the challenger. If, then, the party has exercised the privilege to the extent given by the statute, it cannot be alleged as error that qualified jurors are afterwards drawn or placed in the panel. His right to have his case tried before a fair, impartial and qualified jury remains unimpaired, and its selection is secured through the exercise of the challenge for cause, which still remains." The exhaustion of his peremptory challenges by the defendant in the case at bar was voluntary so far as the record shows, and the fact that the court in the exercise of its discretion excused two jurors afterward could work no hardship upon the defendant, unless he was thereafter compelled to accept as a juror some disqualified person. But the record shows that the panel was completed without challenge for cause having been made to any of the jurors accepted and a peremptory challenge only was sought to be exercised as to the last juror called. The defendant, having voluntarily exhausted his peremptory challenges, could not claim any additional peremptory challenges, and, having been tried by a qualified jury, can claim no error in impaneling the jury.

4. The errors predicated upon the admission of the testimony regarding the signing of shipping articles on the ship

Riversdale by the sailors Buren and Cyren, on the ground that such evidence tended to prove the crime of enticing seamen, which was not charged in the information, are not tenable in view of the instruction requested by defendant and given to the jury, telling them that the defendant was not charged with that crime and they could not find him guilty of such offense.

5. The objections to the testimony regarding the desertion of witnesses Cyren and Pearson from a certain ship were properly sustained. Such testimony was sought for the purpose of affecting their veracity or character. Section 852, B. & C. Comp. provides how a witness may be impeached, and expressly says, "but not by evidence of particular wrongful acts."

6. Dr. Black was called as a witness for the state, and testified that he had been a practicing physician and surgeon since 1886 and had resided at Vancouver since 1897, and had made an examination of Buren on the morning of the second day after he had been assaulted on the dock, but had not examined his body nor had any of his clothing removed, and after describing Buren's condition he was asked, "What, in your opinion, would be the cause of his condition?" An objection was made to the question as incompetent, irrelevant and immaterial, and for the further reason that the witness had not qualified himself to testify as an expert in that matter. In support of his objection the defendant relies upon the rule in *State v. Simonis*, 39 Or. 114 (65 Pac. 595), wherein it is said the mere fact that a witness is a regularly licensed and practicing physician in this state is not sufficient in itself to qualify him as an expert. In that case "there was no evidence that he [the witness] is a graduate of any medical school, or had taken a regular course in medicine, or had been examined by the state medical board, or as to the length of time or extent of his practice, or his experience in cases of poisoning." In this case the witness testified that he had been a practicing physician and surgeon for about 17 years; thus giving the length of time of his experience, and stating a fact from which the court could determine in some measure his qualifications as an expert, and clearly taking the case out of the rule in *State v. Simonis*. As stated in 8 Ency.

Pl. & Pr. 747: "This fitness of a witness to testify as an expert is a question of fact, and is addressed in every instance to, and lies within, the sound discretion of the trial court." As to the question asked, it was competent. The witness had described Buren's condition and after doing so could give his opinion as to what caused it: *State v. Simonis*, 39 Or. 114 (65 Pac. 595).

7. The error assigned, if any, in overruling the motion to strike out as hearsay the testimony of Buren as to what Cyren and Pearson told him Harry White had said to them, could work no prejudice to defendant on that ground, in view of the fact disclosed by the record that Cyren himself testified to what Harry White had told him and Pearson, and it was substantially the same as stated by Buren: *State v. Morse*, 35 Or. 462 (57 Pac. 631).

8. It is insisted, however, that the statements made by Jack Grant to Buren, Cyren and Pearson about what the White brothers would do to them if they attempted to board the Riversdale were not admissible for the reason, first, that Harry White did not hear them and had no part in the conversation; and, second, that there was no proof of conspiracy upon which to admit the statements, and this last reason is also assigned for the exclusion of the statements made by Harry White to Cyren and Pearson about what would be done to them if they attempted to board the ship. The record, however, shows by the testimony of Cyren that, while Harry White may not have heard some of the preliminary conversation between Grant and the witnesses, he did hear the important statements and also that he himself shortly afterwards made practically the same statements to Cyren and Pearson when they met him and Grant, so there was no error in either event so far as the first reason is concerned.

9. Upon the question of the sufficiency of proof of a conspiracy, before admitting the declarations of a co-conspirator, Mr. Chief Justice MOORE, in *State v. Moore*, 32 Or. 73 (48 Pac. 468), after citing and quoting from several authorities, said: "From this it would seem to follow that when any evidence offered reasonably tends to create an inference of the

existence of an unlawful agreement, to the satisfaction of the judge trying the action, it would be his duty to permit the introduction of evidence tending to show the declarations and acts of the alleged co-conspirators, and thereafter to instruct the jury upon the great importance of finding that an unlawful combination had been consummated before they could consider any evidence, the introduction of which was dependent upon such finding." This same doctrine was afterward approved by this court in *Pacific Livestock Co. v. Gentry*, 38 Or. 275, 286 (61 Pac. 422, 65 Pac. 597), wherein it was held that the declarations of an alleged conspirator were admissible in evidence after testimony had been given which *prima facie* tended to prove the existence of a conspiracy or from which it might be reasonably inferred. Within the foregoing doctrine, there was unquestionably sufficient evidence of the existence of a conspiracy to admit the statements complained of. Mr. Chief Justice WOLVERTON, in *State v. Ryan*, 47 Or. 344 (82 Pac. 703), said: "The acts or declarations of one or more of the conspirators are sometimes admitted before sufficient proof is given of conspiracy. This rests, however, largely within the discretion of the trial court, but the proper connection must be subsequently made, so as to show *prima facie* a conspiracy between all, before such acts or declarations will ultimately be permitted to go to the jury." The objections to the statements were therefore properly overruled.

10. Error is also alleged in the action of the court in overruling the motions to discharge the codefendants, Harry White and Smith, so that they might become witnesses for the defendant. This, however, was a matter, based upon the sufficiency of evidence, within the discretion of the court, and we think there was sufficient evidence to sustain the ruling of the court: Section 1397, B. & C. Comp.

11. The trial court refused the defendants' request to instruct that the codefendants, Wm. Smith and Harry White, were disqualified from testifying in defendant's behalf, and that the jury should draw no unfavorable inferences from the fact that they were not witnesses for defendant, and this is assigned as

error. It is well established in this state that a codefendant not on trial cannot testify for or against a codefendant on trial, unless such codefendant has been acquitted or convicted or discharged as provided in Sections 1396, 1397, B. & C. Comp.: *State v. Drake*, 11 Or. 402 (4 Pac. 1204). It is claimed, however, that since the statute permits a defendant on trial to testify or not as he may choose, and his waiver of such right to testify shall not create any presumption against him (B. & C. Comp. § 1400), and, as counsel contends, the court must so instruct the jury, if requested, it necessarily before us, that the court must, when requested, instruct the jury why codefendants not on trial do not testify, and that no unfavorable inference can be drawn from this failure to appear as witnesses. Conceding, but not deciding, for the question is not before us, that the court must, when requested, instruct the jury, as counsel contends, when a defendant on trial fails to testify, does it follow that a like instruction should be given regarding codefendants who have no choice about testifying and are disqualified by the statute? We think not. The very reason of the rule invoked for the protection of the defendant on trial is wanting in the case of codefendants not on trial. The competency of a witness is entirely a matter for the court to determine, and not for the jury, and the court only is concerned with the reasons why a witness is incompetent to testify. It is purely a question of law for the court. Our statute has given to a defendant on trial the right to testify in his own behalf and at the same time declared that his waiver of such right shall not create any presumption against him. The favor to the defendant is given by the statute and is limited to his own act of testifying or not, as he may choose, and is not intended to apply to what he might say or do if testifying, or to what others testify about him or his acts or declarations. No presumption shall be created against him by reason or because of his act in failing to testify. The law does not say no presumption shall be created against him by evidence of what he may have said or done in other matters as shown by the testimony of his acts and declarations in such matters. The favor is granted the defendant in

respect to his own failure to testify, and not for the failure of some one else, whether competent or not. No such favor is extended the defendant for the act of his codefendant not on trial. So long as the codefendant cannot testify it would seem absurd to require the court to instruct the jury that no unfavorable inferences should be drawn from the failure to do what the law expressly says cannot be done.

Numerous other assignments of error are specified, but we have carefully examined the record and think that they are not well taken, and that the case was fully, fairly and properly presented to the jury by the court and no substantial right of the defendant has been affected.

The judgment of the lower court will be affirmed, and it is so ordered. AFFIRMED.

Argued 5 July, decided 23 October, 1906.

LINDSAY v. GRANDE RONDE LUMBER CO.

87 Pac. 145.

MASTER AND SERVANT—PERSONAL INJURY—CONSTRUCTION OF COMPLAINT—NEGLIGENCE IN NOT PROMULGATING RULES AND REGULATIONS.

1. In an action for injuries to an employee sustained in running logs down a shoot for defendants, a complaint alleging that without the enforcement of regulations governing the manner in which the work was to be done the place at which plaintiff was working was extremely dangerous, and that defendant neglected to promulgate or enforce any rule or regulation for the safety of its employees, the want of which was the cause of the accident, and that defendant had an employee at the head of the shoot to start the logs and warn the employees below, but that shortly before the accident such employee had been removed and others directed to send the logs down without any system, after which plaintiff was injured, is sufficient as charging negligence in not providing suitable regulations governing the conduct of the work.

APPEAL—RIGHT OF SUPREME COURT TO MODIFY EXCESSIVE VERDICT.

2. The supreme court cannot reduce an excessive verdict, since the size of the verdict presents only questions of fact, and they cannot be reviewed under the Oregon practice.

From Union: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action by G. H. Lindsay against the Grande Ronde Lumber Co. to recover for an injury received by the plaintiff while in the employ of the defendant, and alleged to have been caused by its negligence. The defendant is a corporation en-

gaged in the lumber and logging business in Union County. At one of its camps logs were shot from the top of a mountain to the Grande Ronde River, some considerable distance below, through a trench—commonly called a “ground shoot”—made by plowing a couple of furrows and dragging a log through them. The course of this shoot is broken about 10 or 12 rods down the mountain side by a level place called the “middle bench.” Logs were hauled by teams from where they were cut in the woods to the head of the shoot, and there started down toward the river, but, as the shoot was very steep to the middle bench, they descended so rapidly that many of them jumped or bounded from the shoot and stopped at that point. It was therefore necessary for defendant to have men and teams stationed at the middle bench to put the logs back into the shoot and start them on down to the river. The plaintiff had been employed at the logging camp for some time prior to the accident, but knew nothing of the manner in which the work was conducted at the shoot until about the day before, when he was put to work in the timber near by and observed that four or five logs were allowed to accumulate at the head of the shoot, when a man named Kinney would start them down in lots of four or five at a time, first giving warning to the men at work at the middle bench. About 8:30 o’clock on the morning of February 16, 1905, plaintiff was put to work at the middle bench to assist in sending the logs on down, without being instructed or informed as to the manner of conducting the work and with no knowledge upon that subject, except such as he had obtained from observation. After he and his fellow workmen had cleared up the logs that had accumulated at the middle bench they retired a short distance and called for more logs, when Kinney sent others down to them. Some of the logs started by Kinney jumped from the shoot, and while plaintiff and his companions were putting them back, preparatory to starting them on their journey, plaintiff heard Cameron, one of the teamsters, halloo at the top of the mountain, and, looking up, saw a log coming down the shoot very rapidly. He started to run to get out of its way, but was unable to do so. The log bounded out of

the shoot and struck him, crushing his hip, dislocating his shoulder and otherwise seriously and permanently injuring him. He was taken by friends to a hospital at Baker City, where he was confined for 260 days under the care of a physician; his hospital and physician's fees amounting to \$1,400. At the time of the accident he was 33 years of age, in perfect health, and of unusual vigor and healthful physique, but his shoulder is now stiff, and little use can be made of his arm, and his leg is crooked, about four inches short, badly shrunk, and its proper use and strength permanently lost. On account of his injuries and the suffering he underwent his general health is somewhat impaired, and he is incurably and permanently maimed and disabled.

The complaint, after setting out the facts substantially as stated, alleges that by reason of the grade of the shoot from the top of the mountain to the middle bench, and the danger incident to the work of sending logs down it, it was necessary and indispensable for the safe conduct of the work and for the safety of persons engaged therein to have a sufficient number of competent men and appliances stationed at the top of the shoot to start the logs down in a systematic and regular manner, and to see that no logs were started without due notice and warning to the men at work on the middle bench, and a sufficient length of time allowed to enable them to get to a place of safety; that it was also indispensable to the safe conduct of the work and the safety of its employees for the defendant to promulgate and enforce rules and regulations for the government of its employees while engaged in such work, and without such rules and regulations and proper instructions as to a safe, prudent and systematic manner of doing the work the same became and was needlessly hazardous and dangerous to persons at work at the middle bench, who could not by ordinary care and precaution foresee or avoid such dangers; that the ground shoot was insufficient in depth and width to conduct the logs safely down the same, and by reason thereof the middle bench was rendered unusually and needlessly dangerous as a place to work in, and particularly so unless a system and

rules for the safe conduct of the work were promulgated and enforced by the defendant, requiring that warning be given to the men at the middle bench and sufficient time prior to starting a log down the shoot allowed them in which to retire to a place of safety; that at the time plaintiff was detailed for work at the middle bench by defendant an employee with a team was stationed at the head of the shoot to attend to starting the logs down and to see that warning was given a sufficient time beforehand to permit the employees at work at the middle bench to take precautions as to their safety; that such employee had no other duties to perform, and while he was attending to his duties logs were sent down at certain and regular intervals, and after such logs as stopped at the middle bench had been cleaned up such employee gave notice and warning before the next succeeding lot were sent down, and in such manner the employees at work at the middle bench could safely perform their duty.

It is then further alleged that plaintiff believed and was led to believe that the work would so continue, but a short time after he commenced work the defendant, disregarding his safety and without notice to him or with his knowledge, removed such employee and team from the top of the shoot and directed and instructed the teamsters who were hauling the logs to start them down the shoot immediately upon their arrival at its head, without any rules or regulations and without any provision for warning to the persons at work at the middle bench; that immediately after the removal of the employee from the head of the shoot the log which caused the injury to the plaintiff was sent down by one of the teamsters without notice or warning to him; that for want of such notice or warning he had no means of knowing or realizing the danger, and it was impossible for him to take the necessary precaution for his safety; that at the time he commenced work at the middle bench he relied and believed that proper and sufficient warning would be given, and that proper rules and regulations governing the conduct of the work had been promulgated and would be enforced, and he had no notice or information that the logs would be sent down the shoot other than in a regular and systematic manner, and he

was not instructed or informed as to the danger that resulted in his injury; that the defendant knew, or could by the exercise of reasonable diligence have known, of the dangers and that the work of sending logs down the shoot could not be conducted with safety without promulgating and enforcing rules and regulations for the safe conduct of the work, and that defendant knew, or by the exercise of reasonable diligence could have known, that to conduct the work without such rules and regulations and the enforcement thereof subjected plaintiff to an unforeseen and unusual peril that resulted in his injury, notwithstanding which defendant neglected, failed and omitted to promulgate or enforce any sufficient rules or regulations for the safe conduct of the work, and neglected, failed and omitted to give any notice or in any manner warn plaintiff of the dangers; that the defendant through its negligence caused the log which injured plaintiff to be started down the shoot without sufficient previous notice to him, and, in disregard of his safety, operated the work at the top of the shoot at the time of the accident in a careless and negligent manner which caused and resulted in the accident and injury to the plaintiff.

The answer denies all the allegations of the complaint, except the incorporation of the defendant, that it was engaged in the lumber and logging business, and that the plaintiff was employed by it at the time of his injury. For an affirmative defense it is alleged that the injury to plaintiff was not due to the negligence of the defendant, but was the result of the ordinary hazards of his employment and the negligence of a fellow servant; that the shoot mentioned in the complaint was properly and safely built and kept in good repair, and the jumping of the logs therefrom as alleged was not due to its faulty construction, but was one of the ordinary incidents of the business of sending logs down such a shoot and a hazard of the employment; that defendant had previously adopted, promulgated and was enforcing rules and regulations known to the plaintiff for the conduct of its employees in running logs down the shoot; that one of these rules provided that before a log should be started the men at work at the middle bench should be notified,

and if the shoot was clear they should immediately seek a place of safety at least 100 feet from the shoot and out of danger in case a log should leave the shoot, and when in such position they were to notify the employee of the defendant stationed at the head of the shoot, who would then start the log down; that this rule was fully complied with by the parties stationed at the head of the shoot, but that the plaintiff negligently and carelessly failed to seek a place of safety after timely warning had been given, and thereby contributed to the cause of his injury. The reply denied all the affirmative allegations of the answer.

Upon the issues thus joined the cause was tried to a jury and verdict rendered in favor of the plaintiff for \$17,000. A motion for a new trial, on the grounds (a) that the verdict is excessive and appears to have been given under the influence of prejudice and passion, (b) insufficiency of the evidence to justify the verdict, and (c) error of law occurring at the trial, was overruled and judgment entered on the verdict. From this judgment the defendant appeals, assigning error as follows: (1) The overruling of a motion for nonsuit and the refusal to direct a verdict for defendant; (2) refusing to instruct the jury that if Kinney, the person placed at the top of the shoot by defendant to start logs down, did start the log which struck and injured plaintiff, they must find for the defendant; (3) instructing that, if the negligence of the defendant materially contributing to the injury of the plaintiff concurred with the negligence of a fellow servant, the defendant is liable, even if the negligence of the fellow servant contributed to the cause of the injury; (4) instructing the jury that if the work in which plaintiff was engaged at the time of his injury was such as to require rules and regulations for the reasonably safe conduct thereof, and the defendant failed and neglected to provide such rules and regulations and such failure was the proximate cause of the injury, the plaintiff is entitled to recover if he was not negligent himself; (5) modifying two instructions requested by the defendant, to the effect that, if the accident to the plaintiff was due to the negligence of a fellow servant plaintiff could not recover, by adding thereto the

proviso if defendant was itself without negligence; and (6) the overruling of the motion to set aside the verdict because it is excessive and the result of prejudice and passion.

AFFIRMED.

For appellant there was a brief over the names of *Crawford & Crawford* and *Snow & McCamant*, with oral arguments by *Mr. Thomas Harrison Crawford* and *Mr. Zera Snow*.

For respondent there was a brief with oral arguments by *Mr. Leroy Lomax* and *Mr. Gustav Anderson*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. It is unnecessary to notice the alleged errors *seriatim*, for they are all, except the last, based upon the theory that the complaint charges but one specific act of negligence as the proximate cause of the injury to the plaintiff, and that is the removal by the defendant of the employee Kinney from the head of the shoot a short time before the log causing the injury to plaintiff was sent down, and directing the teamsters who were hauling logs to start them down without instructing them how to do so with safety to the plaintiff and others working at the middle bench. With this construction of the allegations of the complaint as a premise, counsel argue that the motion for nonsuit was well taken because the proof shows, as they claim, that Kinney was not removed from the head of the shoot, but was at work there at the time the log causing the injury to the plaintiff was started down, and was in fact the person who started it, and that it was error for the court to instruct the jury in reference to the duties of the defendant to promulgate and enforce suitable rules and regulations governing the work of sending logs down the shoot, because such instructions were not within the issues made by the pleadings. In this construction of the complaint we are unable to concur. It is perhaps unnecessarily long and prolix, but it manifestly proceeds upon the theory that it was the duty of the defendant to exercise reasonable care and prudence to provide the plaintiff with a reasonably safe place in which to work, and that from the nature and character of the work at the middle bench, and the

dangers necessarily attending it, it was not such a place unless the defendant had established and enforced adequate rules or regulations among its employees governing the manner in which the work should be done, and providing for proper and timely warning to the men at work at the middle bench before logs were started down the shoot.

It is expressly alleged that without the enforcement of such rules or regulations the place at which plaintiff was put to work was extremely hazardous and dangerous, and that defendant failed and neglected to promulgate or enforce any rule or regulation for the safety of its employees, and that the want of such a rule or regulation was the cause of the accident to the plaintiff. That the place at which plaintiff was put to work was extremely dangerous and unsafe without the strict enforcement of a rule or regulation requiring the men to be warned of the approach of a log a sufficient length of time to seek a place of safety, and that a failure or neglect of the defendant to promulgate and enforce some such regulation would be actionable negligence, are too clear for argument: *Anderson v. North Pac. Lum. Co.* 21 Or. 281 (28 Pac. 5). And one of the issues made by the pleadings and tried in the lower court was whether the defendant had discharged its duty in this regard. The complaint alleges that it had failed and neglected to provide or enforce such a rule or regulation. This averment is not only denied by the answer, but it is affirmatively alleged that defendant had promulgated and enforced a rule requiring that before a log should be started down the shoot the men at work at the middle bench should be notified and given time to place themselves in a position of safety, and that after they had done so they were to notify the parties stationed at the head of the shoot, who should then send the log down. To disregard these averments of the pleadings and the issues thus tendered and made would be giving to the complaint altogether too technical a construction for the practical administration of justice, and especially so since the question does not seem to have been raised or suggested until the trial.

It is true the complaint alleges that on the morning plaintiff

went to work at the middle bench defendant had an employee (which the evidence shows to have been Kinney) stationed at the top of the shoot to attend to starting the logs and to see that warning was given to the employees working at the middle bench in time to take precaution for their safety, and that while he was attending to his duties logs were sent down at regular intervals, and notice and warning given before the next succeeding lot were started, and that in such manner the work was safely conducted, but that a short time before the accident this employee had been removed and the teamsters directed to send the logs down immediately and without any system, and that after the removal of such employee the log causing the injury was sent down. This is but a part of the averments of the complaint, and it is not alleged that the employee stationed at the head of the shoot had been properly instructed in regard to his duties or that he had been instructed at all, or that suitable rules or regulations had been promulgated by the defendant for his guidance, or that his removal was the sole and proximate cause of the injury to the plaintiff. Indeed, the contention that the complaint assumes that he had been properly instructed as to his duties is negatived by the positive averment that no rules or regulations had been promulgated by the defendant governing the conduct of the work at the shoot or the manner of giving warning to the employees at the middle bench of an approaching log. We are of the opinion, therefore, that the complaint charges negligence in not providing suitable rules or regulations governing the conduct of the work, and that the court was not in error in submitting the cause to the jury on that theory.

2. The remaining question arises upon the overruling of the motion to set aside the verdict because it is excessive. It was held by this court in *Nelson v. Oregon Ry. & Nav. Co.* 13 Or. 141 (9 Pac. 321), that where the verdict of a jury in an action of this kind is excessive it is the duty of the trial court to set it aside, but its refusal to do so cannot be reviewed on appeal because it does not present a question of law, but one of fact, which the court is not authorized or empowered to examine.

This case has been subsequently followed (*McQuaid v. Portland & V. Ry. Co.* 19 Or. 535, 25 Pac. 26; *Kumli v. Southern Pac. Co.* 21 Or. 505, 28 Pac. 637; *Coos Bay Nav. Co. v. Endicott*, 34 Or. 573, 57 Pac. 61; *Sorenson v. Oregon Power Co.* 47 Or. 24, 82 Pac. 10), and we know of no reason why it should be now disregarded. The verdict in this case is large, but the trial judge, who saw the parties, heard the witnesses, and was necessarily more familiar with the facts than we can be from reading the record, declined to disturb the verdict, and nothing appears to justify our interfering with his conclusions, even if we had the right to do so.

Judgment affirmed.

AFFIRMED.

Argued 3 October, decided 23 October, 1906.

GOSS v. NORTHERN PACIFIC RAILWAY CO.

87 Pac. 149.

NEGLIGENCE—RES IPSA LOQUITUR.*

1. The doctrine of *res ipsa loquitur* becomes applicable through the circumstances surrounding and accompanying the occurrence causing the injury complained of, rather than by the occurrence itself. Usually the description of the event includes circumstances from which negligence may fairly be inferred; yet there are cases (and this is one) where the occurrence does not justify any inference of negligence.

NEGLIGENCE—EVIDENCE REBUTTING PRESUMPTION.

2. Where the evidence of negligence is entirely inferential and the testimony for the defendant is clear and undisputed to the effect that there was no negligence, the plaintiff's case is overcome as a matter of law and it becomes the duty of the judge to take the case from the jury.

For instance: In an action for injuries to a passenger caused by the sudden closing of a railway car door on his hand, any presumption of negligence arising from the accident is overcome by the uncontradicted evidence that the catch provided for the car door was in good repair, and that the train was not operated at a dangerous rate of speed, and hence a verdict was properly directed in favor of defendant.

From Multnomah: ARTHUR L. FRAZER, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

*NOTE.—With this case read *Esberg Cigar Co. v. Portland*, 34 Or. 282, a negligence case involving the question *res ipsa loquitur*, but not cited in the briefs.

See, also, monographic notes: "Presumption of Negligence From the Happening of an Accident Causing Personal Injuries," 113 Am. St. Rep. 986-1031; "Applicability of the Rule *Res Ipsa Loquitur* in the Absence of Contractual Relations," 6 L. R. A. (N. S.) 800; and "Presumption of Negligence From Collision Resulting in Injury to Passenger," 4 A. & E. Ann. Cas. 11-13.

This is an action by J. T. Goss against the Northern Pacific Railway Co. for negligence. On August 27, 1903, the plaintiff was a passenger on one of the defendant's trains from Kalama to Tacoma. Having occasion during the journey to go to the toilet, he found the room occupied, the door locked and the door from the car to the platform opened back against the toilet door. He started to step out on the platform to await an opportunity to enter the toilet, and while he was passing out put his hand on the door frame to steady himself, when the door suddenly closed, crushing his finger. At the close of the testimony the court directed a verdict for the defendant, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the name of *Spencer & Davis*, with an oral argument by *Mr. Schuyler Colfax Spencer*.

For respondent there was a brief over the name of *Carey & Mays*, with an oral argument by *Mr. Arthur Champlin Spencer*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

We are of the opinion that the court was right in directing the verdict. The negligence charged is that the catch for the car door was insufficient and out of repair, and that the train was being operated at a high and dangerous rate of speed, which caused the door to become disengaged from the catch by the lurching of the train. The proof does not, in our opinion, sustain either of these allegations. The plaintiff, who is a contractor and had frequently traveled on defendant's trains between Kalama and the Sound and was familiar with its cars and road, testified that at the time he tried the toilet door the car door was opened back and fastened to a hook or catch on the floor, which was of the kind ordinarily used in railway coaches; that the train was running quite fast, he thinks about 50 miles an hour, and was passing around a curve at the time of his injury, and that, in his opinion, the raising of one side of the car while going around the curve was the cause of the door becoming unfastened and shutting against his finger; that he made no examination of the catch to ascertain whether it

was out of repair, and does not claim that it was, or that the train was running at an unusual rate of speed, but says that it was running on schedule time and over a good roadbed. The conductor, brakeman, car inspectors and other witnesses for the defendant, who examined the door catch at the time of or immediately after the accident, all testify that it was in good repair, of the latest make and pattern, and such as is ordinarily used on first-class railway coaches. The conductor and engineer both testify that the train was not running at an unusual rate of speed, but was on schedule time, running about 22 miles an hour.

1. The case as thus made out by the testimony of the plaintiff and all the other witnesses, was simply the sudden closing of a car door, the fastenings of which were in good repair, on a train moving at the usual rate of speed, and without any proof that it was due to the negligence of the defendant or of any facts from which an inference of negligence could be drawn. The plaintiff claims, however, that proof of the occurrence of the accident and the extent of his injury made a *prima facie* case in his favor, and cast the burden upon the defendant to show that the accident was without its fault, and that whether such presumption was overcome by the proof was a question of fact for the jury, and not the court. Ordinarily the mere fact of an accident does not *per se* raise a presumption of negligence, but often negligence may be implied from the facts and circumstances disclosed, in the absence of evidence showing that the accident occurred without negligence: Shearman & Redfield, Negligence (4 ed.), § 59; 2 Thomas, Negligence (2 ed.) p. 1093; Jaggard, Torts, 938. Thus, where the evidence shows that the defendant had the exclusive management and control of the thing which caused the injury, or where it appears that the accident occurred through some defect in the vehicle, machinery, roadbed or appliances, the circumstances, if unexplained, may be sufficient to justify a jury in drawing the inference of negligence, under the rule of *res ipsa loquitur*. This doctrine has been frequently recognized and the principle applied by the courts in a variety of cases, such as

accidents from fallen electric light wires (*Boyd v. Portland Elec. Co.* 40 Or. 126, 66 Pac. 576, 57 L. R. A. 619; s. c. 41 Or. 336, 68 Pac. 810; *Chaperon v. Portland Elec. Co.* 41 Or. 39, 67 Pac. 928), or from the falling of a sleeping car berth (*Hughes v. Railway Co.* 39 Ohio St. 461), or from the derailment of a train upon which the plaintiff was riding (*Montgomery, etc. Ry. Co. v. Mallette*, 92 Ala. 209, 9 South. 363; *Southern Kan. Ry. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45; *Feital v. Middlesex Railroad Co.* 109 Mass. 398, 12 Am. Rep. 720; *Spellman v. Lincoln Rapid Transit Co.* 36 Neb. 890, 55 N. W. 270, 20 L. R. A. 316, 38 Am. St. Rep. 753), or by a train running into a landslide (*Gleeson v. Virginia Midl. Ry. Co.* 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458), or colliding with another train or an obstruction on the track (*Louisville & N. R. Co. v. Ritter's Adm'r*, 85 Ky. 368, 3 S. W. 591; *Smith v. St. Paul City Ry. Co.* 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550), or by the upsetting of a stage coach, etc.: *Stokes v. Saltonstall*, 38 U. S. (13 Pet.) 181, (10 L. Ed. 115). See additional cases collated in 3 Am. Neg. Rep. 488. But in nearly if not quite every case that has come under our notice in which the rule has been applied, it appeared either that the thing causing the injury was under the exclusive control of the defendant, or that the injury resulted from the breaking of machinery, the derailment of cars, or something improper or unsafe in the appliances or the conduct of the business. In other words, that it was not the injury alone from which the negligence was presumed, but the manner and circumstances under which it occurred, which justified the application of the maxim. An unusually clear and learned discussion of the question will be found in the opinion of Mr. Justice CULLEN, in *Griffen v. Manice*, 166 N. Y. 188 (59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630).

It is doubtful, therefore, whether the rule can be applied in the case at bar. The car door which caused the injury to the plaintiff was not under the exclusive control of the defendant, but was being constantly used by passengers boarding and alight-

ing from the train and in going from one car to another, and there is no evidence that it was or had been opened or fastened by the defendant's employees, and not by a passenger. Nor is there any testimony that the accident was due to a defect in the door or the fastening or the unusual movement of the train. There was therefore no proof of any fact or circumstance attending the accident from which an inference of negligence could be drawn. The case as made was similar to that of a passenger injured by the falling of a car window, in which case it has been held that mere proof of the injury raises no presumption of negligence against the defendant: *Faulkner v. Boston & M. R. Co.* 187 Mass. 254 (72 N. E. 976); *Strembel v. Brooklyn Heights R. Co.* 96 N. Y. Supp. 903.

2. But, whatever the rule may be, and assuming that the doctrine applies in a case of this character, the evidence as given on the trial was so clear and convincing that the accident was not due to the negligence charged in the complaint as to completely overcome any presumption which may have arisen from the mere happening of the accident. The evidence had no affirmative signification in establishing negligence on the part of the defendant, but the negligence complained of was left wholly and entirely to inference and presumption from the mere happening of the accident. This presumption, if it existed at all, was overcome by the plaintiff himself, as well as by the other witnesses in the case, and it was therefore not error for the court to direct a verdict in favor of the defendant: *Spaulding v. Chicago & N. W. Ry. Co.* 33 Wis. 582; *Menominee River, etc. Co. v. Milwaukee & N. Ry. Co.* 91 Wis. 447 (65 N. W. 176). "Where," as said by Mr. Justice WOLVERTON, in *Boyd v. Portland Elec. Co.* 41 Or. 336, 346 (68 Pac. 810), "the evidence of the plaintiff has affirmative significance in establishing negligence, and the negligence complained of is not left wholly to inference or presumption, the question becomes a matter for the jury, to be determined by the preponderance of evidence." But, where there is no proof of negligence, except the mere inference of presumption arising from an accident, and this is overcome by

positive, undisputed and unimpeachable testimony, there is no question of the preponderance of evidence, and nothing for the jury to decide.

Judgment affirmed.

AFFIRMED.

Argued 31 July, decided 23 October, 1906.

MORTON v. OREGON SHORT LINE RY. CO.

87 Pac. 151, 1046; 7 L. R. A. (N. S.) 344.

WATER COURSES—RESTORATION OF CHANNEL.

1. Where a freshet causes a natural stream to form a new channel across the land of a riparian proprietor, the latter may, within a reasonable time, restore the flow to its original bed.

RIPARIAN OWNER—RIGHT OF LICENSEE.

2. The rights of a licensee of a riparian proprietor as to the stream are the same as those of the licensor, but not greater.

STREAM AND SURFACE WATER—FLOODS.

3. Water flowing in a swollen stream is not surface water which may be considered a common enemy, and one undertaking to protect his own land from such water must not injure the property of others.

WATER COURSE—RIGHT TO BUILD JETTY—RIPARIAN DAMAGE.

4. A jetty built to restrain and control the flow of a stream for the protection of the riparian property of the builder, but which causes the water to injure another bank owner, is an unlawful obstruction, the maintenance of which may be enjoined.

JUDICIAL NOTICE—LAWS OF NATURE.

5. Courts will take judicial notice of the effect of the waters of a stream during a flood turned nearly at right angles against the land of a riparian proprietor, such effect being dependent on the laws of nature.

COSTS IN EQUITY ARE DISCRETIONARY.

6. The apportionment of costs and disbursements in equity is entirely discretionary with the court, under Section 566, B. & C. Comp.

RIGHT TO MODIFY DECREE ABATING OBSTRUCTION TO STREAM.

7. Where a riparian proprietor has constructed a jetty into a stream, the effect of which is to cause the water to flow almost at right angles against plaintiff's land, injuring it, and the court has decided that the jetty is an unlawful obstruction, which plaintiff is entitled to have abated, the order may be modified on a showing that the demolition of the entire jetty is unnecessary, and that a retention of a part of it will not injure the plaintiff's premises, but will afford protection to the defendant.

From Malheur: GEORGE E. DAVIS, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by J. A. Morton against the Oregon Short Line Railway Co., a corporation, to enjoin the maintenance of obstructions to the flow of water in a stream. The complaint states, in substance, that the plaintiff is the owner of certain

real property in section 28, township 18 S., of range 47 E., in Malheur County, which land lies west of and borders on the Snake River; that in 1904, the defendant built above such premises in the west channel of the stream certain dams which deflected the water, depositing sediment in the channel, and shoaling it so as to prevent the operation of plaintiff's private ferry boat from his land to an island in the river, and also depriving his arid land of water from the river for subirrigation; that these obstructions caused another channel to form in such a direction as to force a current directly against the bank of his land, cutting away a wide margin thereof, and, if such encroachment is permitted to continue, it will force a channel through a depression in his premises, making an island of a part thereof to his irreparable injury, to redress which he has no plain, speedy or adequate remedy at law. The answer denied the material allegations of the complaint, and averred, in effect, that in 1883 the defendant built its railroad through Malheur County on the right of way now occupied thereby and thereafter maintained its roadbed and track, operating trains thereon for the benefit of the public; that at the time the railroad was constructed the water of Snake River, during each freshet, flowed through a swale situated between the roadbed and the west channel of the river, and the floods in that stream have cut and are cutting away the bank near the track, thereby endangering the roadbed to such an extent that the defendant was compelled to build the obstructions complained of, to prevent its property from being destroyed; and that the swale is the so-called channel referred to in the complaint as the west channel of the river, but that such swale is, and at the time the railroad was constructed was, at least 300 feet west of the west channel of Snake River. The reply having put in issue the allegations of new matter in the answer, the cause was referred, and from the testimony taken the court made certain findings and dismissed the suit, from which decree the plaintiff appeals. REVERSED.

For appellant there was a brief over the names of *William Rufus King* and *W. H. Brooke*, with an oral argument by *Mr. King*.

For respondent there was a brief over the names of *P. L. Williams, Frank Sigel Dietrich* and *A. N. Soliss*, with an oral argument by *Mr. Dietrich*.

MR. JUSTICE MOORE delivered the opinion of the court.

The transcript shows that the plaintiff is the owner of the real property mentioned, and that his land borders on the west bank of the Snake River. The township referred to was surveyed in 1874, and the field notes thereof, a copy of which was offered in evidence, show that the left bank of the river, as meandered, then intersected the south boundary of section 33 at a point 68.35 chains west of the southwest corner of that section, and extended northwesterly by a curved line to a point west, but near the center, of section 33; thence, by a similar line northeasterly, to a point east of the northeast corner of that section; thence westerly and northerly by a curved line to a point west of, but near the center of, section 28; and thence northeasterly to a point 2.80 chains east of the northeast corner of the latter section. A sketch of the margin of the river as indicated will disclose that when the government survey was made, the stream flowed around a peninsula over which the boundary between sections 28 and 33 extended. The defendant, in 1883, constructed its railroad from Huntington, Oregon, southerly through the premises hereinbefore described, and also through adjoining land on the south, now owned by H. M. Plummer. The defendant offered in evidence a blue print of the *locus in quo*, reduced to a scale of 400 feet to the inch, which indicates the original course of the river as meandered, the line of the railway as constructed, and other data. It appears from this plat that the railroad was built about 14 rods west of the meander line at the bend near the center of section 28, and about 52 rods west thereof at the curve near the middle of section 33. An extraordinary freshet in Snake River in 1894 cut across the base of the peninsula a new channel, which extends northeasterly over what theretofore had been a meadow. Prior to such change, a large part of the river below the peninsula flowed in a channel that separated plaintiff's land from Datey Island, east of his

premises; but, after such flood, the greater volume of water flowed east of that island. Immediately north of section 33, but south of Datey Island, the change in the channel of Snake River formed a large sand bar, constituting an island, the surface of which was above the ordinary stage of water. The bar is separated from the left bank of the river by a narrow channel which extends northerly, and is also severed from Datey Island by a broader channel that extends northwesterly; the waters of which unite and flow by plaintiff's premises.

The freshet adverted to and the annual floods in the river have washed away the left bank of the stream in sections 28 and 33, nearly to the east line of the right of way of the railroad, and, to prevent further injury therefrom, the defendant placed several hundred car loads of rock along the margin of the river; and in 1903, with Plummer's consent, it built, where the swale had been, five jetties that extend from the bank down stream at an acute angle with the thread thereof. These obstructions were made by driving parallel rows of piling about 12 feet apart, and filling the intervening space with brush and rock. The lower jetty is about 215 feet long, and extends nearly across the channel west of the sand bar at the head thereof. The other jetties are from 50 to 75 feet in length. Another extraordinary freshet in 1904 caused the bank of plaintiff's land, for a distance of about half a mile, to be washed away to the depth of 100 feet or more, whereupon he instituted this suit, and, at the trial, offered testimony tending to show that the lower jetty prevented the water from flowing in the channel west of the sand bar, thereby permitting the current in the channel between the bar and Datey Island to flow nearly at right angles against his bank, damaging it; that the closing of the channel west of the sand bar caused sediment to be deposited, shoaling the channel east of his land, and preventing him from operating, by force of the current, a ferry boat which he maintained for his own use from his premises to Datey Island, a part of which he held by lease from year to year, and another part thereof was claimed by his son as a homestead where cattle were pastured in which he had an interest; and that if the lower

jetty be maintained the diminution of water in the channel will prevent the subirrigation of his land, which is arid, and will also prevent the water in the channel north of the sand bar to cut into a swale on his premises, thereby forming a new course through his land and creating an island.

The testimony relating to the injury which it is claimed will result to plaintiff's land by the maintenance of the lower jetty, though given by persons living in the vicinity of his premises, who are acquainted therewith, know the character of the soil, and the effect thereon of freshets in the river, consists of the opinions of several witnesses, and it is possible that the disastrous consequences which they predict may not eventuate. It was stipulated that three civil engineers who were employed by the defendant would, if present, testify that in the early spring of 1905, they made accurate measurements of the left bank of the river through the plaintiff's premises, setting stakes along the margin of the stream, and that returning to his land in the latter part of July, after the annual freshet had subsided, they found that no part of the bank had been washed away during that season, but that the water in the river in 1905 was not as high as it was the preceding year. The foregoing is deemed a fair statement of the material facts involved, and, based thereon, the question to be determined is whether or not the jetties can legally be maintained where they are built. The defendant's counsel insist that the river having suddenly changed its channel in 1904, thereby endangering the railroad track, their client, to protect its property, was authorized to restore the flow of the stream to its original bed, and hence the decree should be affirmed.

1. It has been held that the person across whose land a freshet in a natural stream suddenly causes a new channel to be formed may, within a reasonable time, restore the flow of water to its original bed: *Farnham, Waters*, § 491; *Mathewson v. Hoffman*, 77 Mich. 420 (43 N. W. 879, 6 L. R. A. 349).

2. It will be remembered that the defendant built the jetties into the river from the bank of Plummer's land with his consent, and, as he is a riparian proprietor on the new channel, the

railway company, as his licensee, secured such right to change the flow of the current as he possessed: *Slater v. Fox*, 5 Hun, 544.

3. An examination of the blue print referred to shows that the upper jetty is built nearly half a mile below the original meander line of the river where it commenced to cut the new channel, and as the barriers complained of do not force the water around the peninsula, they were evidently constructed to prevent injury to the railroad grade by deflecting the current. Instead, therefore, of attempting to restore the stream to its ancient channel, the defendant, by building the jetties, has in fact recognized the new way as the true water course, and tried to confine it to the bed as at first made. The swollen current of Snake River during floods is nevertheless a part of that stream at the place where the jetties are built, and not surface water, within the accepted meaning of that term, against which a land proprietor may combat as he would oppose a common enemy, though he thereby injures the real property of others: *Price v. Oregon Railroad Co.* 47 Or. 350 (83 Pac. 843).

The defendant's counsel, in support of the decree rendered, cite the case of *Gulf, etc. Railway Co. v. Clark*, 101 Fed. 678 (41 C. C. A. 597), upon the authority of which the trial court evidently relied. In that case a railroad company, to protect its roadbed, a part of which had been washed away by the gradual change of the channel of a river, built dikes some distance from the bank of the stream on what was formerly solid ground, to restore the current to its original channel. These dikes encroached upon the channel as it existed when they were built, and deflecting the current a subsequent freshet in the river washed away part of the land of a riparian proprietor, who, in an action to recover the damages sustained, secured a judgment, in reversing which the circuit court of appeals says: "A riparian owner may construct necessary embankments, dikes or other structures to maintain his bank of the stream in its original condition, or to restore it to that condition, and to bring the stream back to its natural course; and, if it does no more, other riparian owners upon the opposite or upon the same side of the (48th Or.—29)

stream can recover no damages for the injury his action causes them." In that case, as the means adopted to prevent the road-bed from injury from encroachments of the channel consisted of dikes, the term "other structures" referred to in the opinion quoted, evidently means similar formations, and not jetties placed in a stream to deflect its course. The conclusion reached in the case adverted to is at variance with the rule announced in *Garrish v. Clough*, 48 N. H. 9 (97 Am. Dec. 561, 2 Am. Rep. 165), where it was held that though a riparian proprietor was authorized to protect the bank of his land from injury from the encroachment of a natural stream, he could not, without incurring liability, erect any structure for that purpose which would injure the property of others. These cases illustrate the conflict that exists in respect to this important subject. Which rule is founded on the better reason, or supported by the greater weight of judicial utterance, is not necessary to a decision herein.

The words "embankment" and "dike," when used to represent the means employed to prevent the inundation of land, are synonymous, and mean a structure of earth or other material usually placed upon the bank of a stream or near the shore of a lake, bay, etc., the ends of which extend across low land to higher ground, forming a continuous bulwark or obstruction to water, and designed to keep it without the inclosure thus formed. A "dam," however, is a structure, composed of wood, earth or other material, erected in and usually extending across the entire channel at right angles to the thread of the stream, and intended to retard the flow of water by the barrier or to retain it within the obstruction. A "jetty" is a kind of a dam, usually built in the manner hereinbefore described, and intended to deflect the current so as to deepen the channel or to form an eddy below the obstruction in which sediment may be deposited, thereby extending and protecting the bank.

4. Assuming, without deciding, that an embankment may be built by a riparian proprietor to prevent his land from being submerged in extraordinary freshets, we think a jetty cannot be classed as "other structures," specified in the case relied upon, and that when they, by deflecting the current or by shoal-

ing the water, injure a lower riparian proprietor, the author of the obstructions violates the maxim, "*sic utere tuo, ut alienum non laedas.*" One of the issues to be tried is the identity of the water course west of the sand bar at the head of which the long jetty is built. "The channel," says a distinguished text-writer, "is the passageway between the banks through which the water of the stream flows:" Farnham, Waters, § 417. This definition was undoubtedly intended to apply only to the entire uninterrupted space occupied by water flowing between well defined banks. The description of a channel, as given by the learned author, is broad enough, however, to include the flow of water between an island and a bank of a stream, and hence the exact meaning of the word embraces the passageway that was obstructed by the defendant's lower jetty. As the blue print shows this to be a water course which is indicated by the explanatory words "Very swift and shallow," and shows the passageway to be the most westerly route, we have no doubt that it is, as alleged in the complaint, the west channel of the Snake River.

5. It appears from the transcript that the lower jetty was intended to close this entire channel, but that the water, deflected by the angle of the barrier, washed the sand from the outer end of the obstruction, permitting a part of the current to continue in the bed of the stream west of the sand bar, but causing the greater volume to flow east thereof. As a jetty is a species of dam, and the lower obstruction deprives a riparian proprietor of the accustomed flow of water in the channel of the stream, is the deprivation of the right which is incident to the estate, such an injury as will authorize the granting of the relief sought? The plaintiff and his witnesses express the opinion that if the water is permitted to flow in the west channel, it will continue its course along the bank of his land and diverge the current, which otherwise strikes his premises at nearly right angles. This consensus of opinion is not based on observations as to the effect of the water at the line of injury to plaintiff's land during the flood of 1904, but the consequences assumed, though speculative, seem so reasonable and dependent upon the

laws of nature, of which a court will take judicial notice, that we are forced to the determination that injury must necessarily result to plaintiff's premises, and to his property rights incident thereto, if another freshet should occur in the river. The conclusion thus reached makes such a case as entitles the plaintiff to equitable intervention, but, as the lower jetty is the only one of which he seriously complains, that obstruction only will be ordered abated.

6. The defendant's objections to the plaintiff's right to institute this suit and to prosecute this appeal not being deemed important, the decree is reversed, and one will be entered here requiring the defendant, within three months from the entry of a mandate herein in the lower court, to remove the long or lower jetty; the plaintiff to recover his costs and disbursements in both courts.

REVERSED.

Decided 18 December, 1906.

ON MOTION TO MODIFY DECREE.

MR. JUSTICE MOORE delivered the opinion of the court.

7. After the opinion was announced in this case the defendant's counsel moved to modify the decree rendered in this court so as not to require the entire demolition of the long jetty, insisting that the retention of a part thereof will not injure the plaintiff's premises, and will afford some protection to the railroad embankment from erosion from the water. It is impossible to determine from the evidence before us whether or not the motion interposed should be allowed, and, this being so, the cause, upon the payment by the defendant of the costs and disbursements taxed, will be remanded, with directions to take testimony upon this question, and, if it shall appear therefrom to the trial court that any part of the long jetty can be allowed to remain without injury to the plaintiff's premises, to enter a supplemental decree to that effect, but if this cannot be done, to deny the motion.

REVERSED.

Argued 4 October, decided 30 October, 1906.

HAMILTON v. HOLMES.

87 Pac. 154.

DEED—MENTAL CAPACITY OF GRANTOR.

1. The evidence here does not show such a state of the grantor's mind as to render her incompetent to execute the deed in question, though she was much depressed by the death of her children and her domestic disagreements, and was hysterical and incoherent at times. This conclusion is partly influenced by the fact that competent medical witnesses who attended her about the time in question were not called.

RELATION BETWEEN ATTORNEY AND CLIENT—CONTRACTS FOR FEES.

2. The relation between an attorney and a client is one requiring the utmost fairness by the attorney and contracts between them advantageous to the former will be closely scrutinized; yet care must be exercised to avoid injustice, for clients are often anxious to secure the services of capable attorneys of reputation and tact, and willingly contract for fees that seem very high in comparison with the charges made by attorneys of less reputation.

ATTORNEY AND CLIENT—INADEQUATE CONSIDERATION.

3. The testimony in this case does not show such a wide difference between the value of the property conveyed and the value of the services performed as to shock the conscience of a chancellor and render the transaction constructively fraudulent.

EVIDENCE CONSIDERED AS TO INTENT—DEED OR MORTGAGE.

4. The evidence submitted in this case does not show that the grantor meant to give a mortgage rather than a deed.

TRUSTEE—EQUITABLE CONTROL—MONEY HAD AND RECEIVED.

5. One holding the legal title to land under a promise to sell and make a given disposition of the proceeds is subject to two alternatives; he can be compelled to sell if he refuses to do so upon the offering of a reasonable price, or, if he sells, the parties entitled to the proceeds may sue for their proportions as for money had to their use.

From Benton: JAMES M. HAMILTON, Judge.

Statement by MR. JUSTICE MOORE.

This is a suit by James E. Hamilton, as sole heir of his mother, Anna Hamilton, deceased, against Webster Holmes and W. H. Holmes to have an absolute deed executed by her to Webster Holmes declared to be a mortgage and for an accounting. The facts are that the defendants, who are attorneys, were employed by Mrs. Hamilton to institute a suit for her against her husband, John Hamilton, for a dissolution of the marriage contract and for a settlement of property rights; and, as she had no money to pay therefor, she agreed to give them, as compensation for the service to be performed, an undivided one-half of all that part of a donation land claim in Benton County which they should secure from her husband. The defendants,

negotiating with Hamilton, obtained by his direction from one Frank Wilkinson, who held the legal title, conveyances to Mrs. Hamilton of an undivided one-half of the north half of such land claim, all interest in the south half thereof, and two lots in Junction City, which deeds were placed in escrow, to be delivered when the divorce was granted. The property rights having been thus amicably adjusted, Mrs. Hamilton, on December 24, 1900, entered into a written contract with the defendants, in which it was stipulated that she would convey to Webster Holmes all her interest in the donation land claim, which he was to sell as soon as practicable and to the best advantage possible, and pay her in cash one-half the proceeds of such sale, retaining the remainder for himself and his codefendant as their compensation. The suit for divorce on the ground of desertion, in which the defendant made no appearance, was tried, and Mrs. Hamilton secured the decree January 29, 1901, on which day, for the expressed consideration of \$500, she executed a deed to "Webster Holmes as trustee," as agreed upon, which deed was duly recorded. Mrs. Hamilton soon thereafter went to Denver, Colo., where she died March 3, 1901, leaving the plaintiff herein her sole heir. The defendant Webster Holmes on August 29, 1901, borrowed from one M. D. Allen the sum of \$700, and to secure the payment thereof gave him a mortgage of all the interest in the donation land claim that had been so conveyed to him.

The plaintiff attained his majority June 20, 1903, and thereafter instituted this suit, alleging that the land conveyed by his mother to Webster Holmes was of the value of \$2,000; that she agreed with the defendants to pay them a reasonable sum for their services, to secure the payment of which she executed such deed, and at the time it was made she was inexperienced in the transaction of business, easily influenced by others, ignorant of the value of such land, and, acting solely on the solicitation of the defendants, and without independent advice, she executed the deed, which was intended as a mortgage to secure the payment of a reasonable sum as attorneys' fees, which is \$250; that the plaintiff requested Webster Holmes to state what sum, if any, was due the defendants as their compensation, and de-

manded of him the execution of a deed to the premises to himself as the sole heir of his mother, but he refused to comply therewith; and that the plaintiff was willing that the defendants should be paid a reasonable attorneys' fee, and offered to pay the same upon the execution of a conveyance to him of such premises free of all incumbrances placed thereon by Webster Holmes. The prayer of the bill is that the defendants be directed to account for the sum of \$700 and interest thereon, as evidenced by the mortgage, less a reasonable compensation as attorneys' fees, and that Webster Holmes be required to convey the premises by good and sufficient deed, clear of all incumbrances, to the plaintiff, and for general relief. The answer denied the material allegations of the complaint, averred the facts, in substance, as hereinbefore stated, and that the defendants agreed with Mrs. Hamilton that Webster Holmes should take and hold the title to such lands in his own name for himself and as trustee for his codefendant, and for no other person, to sell the premises according to the terms of their contract, and that she intended to and did convey all her right, title and interest in the premises without any reservation to herself therein, and that Webster Holmes never at any time held any part of the land in trust for Mrs. Hamilton or for her son, the plaintiff herein. The reply having put in issue the allegations of new matter in the answer, the cause was tried, resulting in a decree as prayed for in the complaint, and the defendants appeal. REVERSED.

For appellants there was a brief over the names of *W. H. and Webster Holmes, in pro per.*, and *Henry Johnson Bigger*, with oral arguments by *Mr. Webster Holmes* and *Mr. Bigger*.

For respondent there was a brief and an oral argument by *Mr. John Bayne*.

MR. JUSTICE MOORE delivered the opinion of the court.

The defendants, as witnesses in their own behalf, testified that when retained by Mrs. Hamilton she represented to them that her father had been the owner of the north half of a donation land claim in Benton County, containing in all 319.85 acres, and that she had been the owner of an undivided one-third of

the south half thereof, the other interests therein being owned by two sisters; that her father moved to California, where he became ill, and she with her family went to that state to care for him, and while there her husband, without any consideration therefor, induced her father to execute to him a deed of his part of such claim, and also two lots in Junction City, which he also owned; that her husband persuaded her to join in executing to one Frank Wilkinson a deed of such real property, including her interest in the south half of such claim, but that the conveyance was made to defraud her out of her property rights, and after her father's death her husband deserted her; that she was compelled to return to Oregon, making the journey with a team, and on the way her three daughters contracted colds from exposure incident to the trip, and died of consumption; that, coming to Salem, Mrs. Hamilton secured employment, whereby she was enabled to support herself and her remaining child, the plaintiff herein, but she felt indignant at the treatment she had received from her husband, and blamed him for the loss of their children, whose death caused her much grief; that the plaintiff's mother did not regard the donation land claim as being worth much, because the buildings thereon were dilapidated and the fences decayed and fallen, so that no profit was derived from the premises, but she considered the lots in Junction City valuable, inasmuch as they had houses thereon that could be rented from which a revenue was derived; that, not knowing the value of the real property in Benton County, except in a general way, they made the agreement with Mrs. Hamilton as hereinbefore stated, and performed the service specified, receiving as their compensation her deed in full settlement thereof, they stipulating to sell the real property so conveyed, and to pay her one-half the sum realized therefrom, but that they had been unable to secure a purchaser therefor; that their attorney's fee for securing the divorce and for adjusting the property rights was fully paid and discharged by the execution of the deed, which was never intended as a mortgage, but was designed as an absolute conveyance of the premises to be held in trust by Webster Holmes for his codefendant, and for no other person; that

at the time Mrs. Hamilton employed them and also when she executed such deed she was competent and qualified to make a valid contract, and, though she mourned the loss of her daughters, her grief was no more than that of other mothers under like affliction; and that they were negotiating with plaintiff's father about two months before they secured a settlement of the property rights of the parties to the divorce proceedings. Mrs. Pugh, a sister of the plaintiff's father, testified that in the fall of 1900 Mrs. Hamilton was very nervous and under a mental strain all the time, and that she would occasionally laugh and talk to herself, while at other times she would cry and wring her hands. The plaintiff, speaking of his mother's mental condition at that time, testified that she would become excited and frustrated about things that did not amount to anything, and that she was very nervous.

It will be remembered that Mrs. Hamilton secured a deed for the undivided half of the north half of the donation land claim in Benton County and the undivided one-third of the south half thereof, her interest therein being equivalent to 133.26 acres. The testimony of several witnesses who are acquainted with this land is that at the time it was conveyed to Webster Holmes it was worth \$15 an acre, or \$1,998.90. The court, however, found it to be of the value of \$2,000. An attorney who appeared as plaintiff's witness testified that the service performed by the defendants in maintaining the suit for a divorce and procuring a decree therein, no defense having been interposed, and in securing out of court a settlement of the property rights of the parties, was reasonably worth from \$100 to \$125. It is argued by plaintiff's counsel: (1) That though the complaint admits that such service was worth \$250, the reasonable value thereof, as disclosed by the testimony, is so small when compared with the worth of the real property pretended to have been conveyed to Webster Holmes in payment thereof as to afford conclusive evidence of such gross inadequacy as to render the transaction constructively fraudulent; (2) that the relation of attorney and client, existing between the defendants and Anna Hamilton when her deed was made to one of them, precludes the accept-

ance of the conveyance, except by way of security; (3) that her ignorance of the value of the land conveyed and her inexperience in relation to transacting business show that she could not distinguish between a deed and a mortgage; and (4) that her mental condition was such that at the time the deed was executed she was easily influenced, which defect, considered in connection with the other circumstances mentioned, raised an inference of unfair dealing, which precludes the defendants from claiming the advantage which they secured, and for these reasons the decree should be affirmed.

1. We will first consider the condition of Mrs. Hamilton's mind when she executed the deed to Webster Holmes, for if at that time her intellect was impaired, such defect, coupled with the other matters adverted to, may be sufficient to avoid her deed, or at least tend to show that it should only stand as security for the payment of a reasonable attorney's fee. No physician was called by plaintiff's counsel to express an opinion concerning Mrs. Hamilton's mental condition, though the testimony shows that in the summer of 1900 she was ill, and received treatment therefor from a doctor. That no medical expert was called to testify on this branch of the case, when one could undoubtedly have been procured, is a circumstance strongly tending to discredit the claim that Mrs. Hamilton was afflicted with mental weakness. That she talked to herself does not necessarily prove intellectual impairment. "The giving of vocal expression to human thought is natural, and observation teaches that persons who live or work alone often talk to themselves. Man was created a social being, and therefore needs companionship, a deprivation of which might induce insanity; but this generally results in such cases from a failure to exercise the reasoning faculties, whereby the mind becomes like a stagnant pond, foul from inactivity, or proceeds from the practice of filthy habits, which solitude seems to cultivate. Excessive grief is generally classed as a moral cause of insanity, which saps the foundation of the mind with tears, and seemingly compels the person distressed therewith to avoid laughter as a source of evil." Browne, Med. Juris. § 49. The death of Mrs. Hamilton's daughters

caused her to grieve, but the laughter which she occasionally enjoyed shows that the sorrow produced by the loss of her children was not excessive, and only such as a loving mother must necessarily have endured. She evidently possessed a mind capable of understanding and appreciating the nature and effect of her business transactions, and she was therefore competent to consummate a valid contract: *Carnegie v. Diven*, 31 Or. 366 (49 Pac. 891); *Swank v. Swank*, 37 Or. 439 (61 Pac. 846); *Dean v. Dean*, 42 Or. 290 (70 Pac. 1039).

2. The relation that existed between the defendants and Mrs. Hamilton, and the compensation which they claim to have received from her for the service which they performed, will next be considered. The relation existing between an attorney and client being confidential and fiduciary, the client must necessarily rely on the attorney in all matters intrusted to him, which dependency places on the latter the duty of exercising the highest degree of fairness in their dealings with each other, which are not regarded as having been consummated at "arms length"; and when their contracts are challenged by the client as unequal, they will be closely scrutinized by the court, and the burden is cast on the attorney to prove that any advantage which he may have secured to himself was not obtained by undue influence: *Weeks, Attorneys* (2 ed.), § 258; 3 Am. & Eng. Enc. Law (2 ed.), 332; 4 Cyc. 960; *Powell v. Willamette Valley Ry. Co.* 15 Or. 393 (15 Pac. 663). A court of equity, when properly appealed to by a client who claims to have been defrauded by his attorney, will not permit the latter to reap the benefit of a hard bargain, or allow him to take an undue advantage of his client in his dealings with him: *Al Foe v. Bennett*, 35 Or. 231 (58 Pac. 508). As the compensation of an attorney is regulated by the terms of an expressed or implied contract with the client (B. & C. Comp. § 560), a contract entered into between them in relation thereto will be upheld when it appears to be fair and honest: *Bingham v. Salene*, 15 Or. 208 (14 Pac. 523, 3 Am. St. Rep. 152). The compensation which an attorney merits and that which he can command for the performance of professional services depends upon the measure of his knowledge of

the law, the extent of his previous practice, and whether or not he had been successful in the trial or settlement of causes, and the degree of his standing at the bar. Attorneys possessing these necessary qualifications are sought after and employed by clients who are able to pay them fees for their service that are commensurate with their education, integrity, ability and tact, while attorneys who have not established for themselves such a reputation generally fail to secure a lucrative practice. As the intellectual labor of an attorney is not like the manual work of an artisan, which can generally be as well performed by one skilled mechanic as another, no schedule of fees can well be adopted that will be just to the successful attorney who has had much experience. If the compensation paid to an attorney is to be measured in every instance by what is considered even to be a reasonable fee, few contracts entered into between an attorney and a client in relation thereto would be upheld, for attorneys may be found who would be willing and anxious to undertake the performance of the service rendered at a much reduced fee.

3. Applying these principles to the case at bar in treating of Mrs. Hamilton's property rights, as she had been the owner of an undivided one-third of the south half of the donation land claim, the defendants might have been able in the divorce suit, in a contest therefor, to have secured such estate for her if they could have established the fact that she had been deprived thereof by her husband with intent to defraud her, and that Wilkinson was his trustee. As none of the other real property had ever been owned by her, but had been conveyed by her father to her husband, the defendants, by making the proof indicated in the divorce suit, could have secured only an undivided one-third of the land: B. & C. Comp. § 511. Mrs. Hamilton was unquestionably entitled to a decree of divorce, as the defendants must have known; but the probability of her securing any interest in the land in the condition in which the title was held was remote. In this state of the case the defendants undertook to try her cause on a conditional fee, and by the settlement out of court, which required about two months' negotiation, they

secured for her an absolute title to the lots in Junction City, an undivided one-half of the north half and all interest in the south half of the donation land claim—a much greater estate than they could possibly have obtained if her property rights had been contested in court. As uncertainty is an element that enters into every contract for the payment of a conditional compensation for the performance of professional service, a contingent fee, in case of the successful termination of a suit or action, it is expected to be greater than where the payment is fixed and certain in any event. This being so, if Mrs. Hamilton had stipulated to give the defendants one-half of the entire real property which they could secure for her, the compensation would not have been unreasonable, in view of the condition of the title, for a moiety in such cases is often the measure agreed upon. The Junction City lots, however, were excepted from the terms of the contract.

What has here been said in relation to the compensation agreed upon will also apply to the alleged ignorance of Mrs. Hamilton as to the value of the land which she stipulated to give the defendants. In the neglected condition of the property she did not consider it as of much value. The defendants were unacquainted with the premises, but as the compensation which they were to receive was contingent, the value of the land is not so important, for the more they secured for her the more they would obtain for themselves. There is not, therefore, such a difference between the value of the services rendered and the worth of the property received as to render the transaction fraudulent, or to show that the defendants exercised any undue influence over their client, or violated in the smallest degree their professional duty.

4. This brings us to a consideration of the remaining question, whether or not Mrs. Hamilton's ignorance in relation to the transaction of business shows that she intended to give the defendants a mortgage, and not to execute to them a deed. There is not a word of testimony in the transcript tending in any manner to prove that she did not intend to execute an absolute deed, and we are satisfied that it was her design to give, and

the defendants' purpose to accept, a conveyance of an undivided one-half of the real property which they could secure for her. Eliminating from the case the circumstances hereinbefore adverted to as tending to show fraud or undue influence, there is not a particle of evidence upon which a decree could be based converting the deed into a mortgage. The defendant Webster Holmes by a subsequent agreement took an absolute title in fee to the premises, in trust, however, to sell the same, and pay one-half the sum so realized to Mrs. Hamilton's legal representative, retaining the remainder for himself and his codefendant; and though he mortgaged the entire premises to secure the payment of \$700 and interest, one-half the value of the land is probably sufficient to pay the entire debt.

5. If he refuses to sell the property when a reasonable sum is offered therefor, a court of equity will compel him to execute the trust, and if he sells without such compulsion, an action at law can be maintained against him to recover one-half the sum obtained as money had and received: *Duclos v. Walton*, 21 Or. 323 (28 Pac. 1).

The plaintiff, however, is not entitled to the relief sought herein and hence the decree is reversed, and the suit dismissed.

REVERSED.

Argued 3 October, decided 30 October, 1906.

OWINGS v. TURNER.

87 Pac. 160.

NEXT FRIEND AS PARTY—DEFECT OF WANT OF CAPACITY TO SUB—DEMURRER—WAIVER OF OBJECTION.

1. The next friend of an incompetent litigant is a "party" to the litigation, and if the incompetent has no capacity to sue, for any reason, the objection must be taken by demurrer, under Section 68, B. & C. Comp., or it will be considered waived, under Section 72.

DEPOSITIONS—EFFECT OF MISDESCRIBING SPECIAL REFEREE.

2. Where depositions have been taken before a specified referee, they should not be suppressed because he was a different official than he was supposed to be, as, where he was described as a notary public in the order of appointment, though he was in fact a United States commissioner.

EVIDENCE OF MENTAL CAPACITY TO EXECUTE DEED.

3. The evidence shows that E. Owings was mentally competent to execute a valid deed on August 20, 1904.

FRAUD—UNDUE INFLUENCE—EVIDENCE—BURDEN OF PROOF.

4. The evidence of the plaintiff compels the inference that the grantee in the deed sought to be canceled unduly influenced the grantor to execute it, thereby casting on the grantee the burden of showing that the grantor understood what he was about to do, and that his consent to the deed was not obtained through taking advantage of his depressed mental and physical condition.

SUFFICIENCY OF EVIDENCE.

5. The evidence for defendant is not sufficient to overcome the inference created by the plaintiff's case that the deed in question was obtained through undue influence.

CANCELLATION OF INSTRUMENTS—RESTORING CONDITIONS—TENDER.

6. In a suit to set aside a conveyance for fraud and undue influence, it appeared that plaintiff had received, in consideration of the conveyance, deeds to two tracts of land. Plaintiff was mentally deficient, and led his attorney to believe that he had executed to defendant a deed to one of the tracts, so that a deed to the other tract was the only deed tendered before the suit was commenced. At the trial, when it was ascertained that no deed had been given to the former tract, a deed thereto was executed by plaintiff and tendered. *Held*, that the tender was sufficient.

From Marion: WM. GALLOWAY, Judge.

Suit to cancel a deed, resulting in a decree for plaintiff, from which defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Bonham & Martin*, with an oral argument by *Mr. Carey Fuller Martin*.

For respondent there was a brief with oral arguments by *Mr. Henry Johnson Bigger* and *Mr. Charles William Corby*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. This is a suit by E. Owings by his next friend, J. H. Wilson, against Henry H. Turner, to set aside a deed, the execution of which is alleged to have been secured in consequence of the plaintiff's mental weakness, and the defendant's undue influence and fraud. The cause was tried and a decree rendered as prayed for in the complaint, from which the defendant appeals, his counsel contending that, if the plaintiff was unable to transact business by reason of his alleged infirmity, he should have been represented by a general guardian, or by some person specially appointed for that purpose, and that Wilson was unauthorized to appear for him in the capacity stated or to institute the suit in his behalf, and hence error was committed in overruling the demurrer to the complaint. The complaint was challenged on the ground that it did not state facts sufficient

to constitute a cause of suit. The statute permits a defendant to demur to a complaint:

"When it appears on the face thereof, either— * *

(2) That the plaintiff has not legal capacity to sue; or * *

(4) That there is a defect of parties plaintiff: B. & C. Comp. § 68.

Further statute provisions are:

"The demurrer shall distinctly specify the grounds of objection to the complaint:" B. & C. Comp. § 69.

"If no objection be taken either by demurrer or answer the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of suit or action:" B. & C. Comp. § 72.

"Ordinarily," says Mr. Justice WOLVERTON, in *Osborn v. Logus*, 28 Or. 302 (37 Pac. 456, 38 Pac. 799), "the objection arising from a defect of parties should be taken by demurrer. if it appears from the face of the complaint, otherwise by answer, and if by neither, it is deemed waived." The incapacity of a plaintiff to sue where, as in the case at bar, he is represented by a next friend, who is regarded as a party, within the meaning of the statute relating to the conduct of suits (14 Enc. Pl. & Pr. 1000), is an imperfection which, if it exists, is apparent on the face of the complaint, and as the demurrer interposed was not based on that ground, the objection now insisted upon was waived.

2. It is maintained by defendant's counsel that an error was committed in overruling their motion to suppress certain depositions. The court, on plaintiff's motion and by consent of the defendant, appointed C. H. Holden, who is stated in the order to be a notary public, as special referee to take, on behalf of the plaintiff, the testimony of James Young and M. D. Scott. Holden took the testimony, and in the certificate attached to their depositions he wrote after his name the phrase, "Special Referee and U. S. Commissioner for Oregon." It is argued that he was not a notary public, and, for this reason, the evidence should have been excluded. A special referee may be appointed in suits in equity to take the testimony of witnesses who, as in the case at bar, reside more than 20 miles from the place of

holding court: B. & C. Comp. § 827. The parties hereto having stipulated that Holden should be appointed, his selection as special referee was evidently based on his well-known qualification to discharge the duty intrusted to him, and not because he was supposed to have been commissioned a notary public. The selection having been made in pursuance of such agreement, the testimony, as taken and certified to by Holden, was entitled to be read in evidence.

3. Considering the case on its merits, the testimony shows that on August 20, 1904, the plaintiff was the owner of 10 acres of land in Marion County, near Chemawa, which on that day he conveyed to the defendant, receiving a deed for 30 acres of land in Lane County which he had never seen, and \$125 in money, of which sum the defendant paid Chris Boss, a real estate broker, \$25, as his commission for negotiating the sale of plaintiff's land. A few days thereafter the defendant paid the plaintiff \$5 for his household goods, tools, hay, etc., taking a receipt therefor. The plaintiff examined the land in Lane County which had been conveyed to him, and, being dissatisfied therewith, he so informed the defendant, who executed to him a deed for 7.31 acres of land near the Reform School, on which the plaintiff erected a small cabin, and made other permanent improvements. This suit was thereafter instituted for the purpose indicated, and also to recover the value of the personal property specified, which is alleged to have been reasonably worth the sum of \$153.40. Dr. W. A. Cusick, a reputable physician, who has made a study of mental diseases, and treated persons afflicted therewith, testified that he had examined Owings, who is about 48 years old and unmarried, and found him lacking in discretion and understanding; that, in his opinion, the plaintiff had been more or less defective all his life, and, as he grows older, his infirmity will probably become aggravated, resulting in a total breakdown, so that he will ultimately have to be taken care of. In referring to the plaintiff's condition at the time he made the examination, the witness further said:

"His appearance was a telltale appearance. There was pro-
(48th Or.—30)

gressive emaciation, or at least a wasting away of the physical powers which proclaimed broadcast his imperfect physical health."

The plaintiff's counsel, complying with the statutory permission (B. & C. Comp. § 718, subd. 10), called nonexpert witnesses, who were intimately acquainted with Owings, and who severally expressed an opinion as to his mental condition at the time he executed his deed, giving the reason for the belief so entertained. An examination of the testimony on this branch of the case convinces us that Owings is not *non compos mentis*, but is and was, August 20, 1904, afflicted with mental weakness which his conversation, general appearance and conduct betray. He possesses, however, sufficient mental capacity fully to appreciate and understand the nature and effect of all his transactions, and was and is competent to make a binding contract, and to execute a valid deed: *Carnegie v. Diven*, 31 Or. 366 (49 Pac. 891); *Swank v. Swank*, 37 Or. 439 (61 Pac. 846); *Dean v. Dean*, 42 Or. 290 (70 Pac. 1039).

4. This brings us to a consideration of the question whether or not Owings, in consequence of his intellectual impairment, was induced by the defendant to enter into a contract, whereby the latter secured an improper advantage by unfair means, which amount to fraud, deceit or imposition. Owings, as a witness in his own behalf, testified, in effect, that, his health having failed while living on the 10 acres referred to, he concluded to sell or trade the premises and go South, thinking the change of climate would be beneficial to him; that, with this idea in view, he came to Salem, August 20, 1904, where he met Chris Boss, a real estate broker, who took him to Turner's office, where the defendant informed him that he owned 30 acres of well-watered garden land in Lane County, which he would exchange for the plaintiff's tract; that a trade was finally consummated by an exchange of deeds, though the witness had never seen the land offered, the defendant paying him the further consideration of \$105, and taking a bill of sale of certain personal property; that the plaintiff thereafter went to Lane County, examined the land referred to, and found it

rocky, without water, and situated on the side of a mountain; that he immediately returned and notified the defendant of his dissatisfaction, who informed him, for the first time, that he owned 7.31 acres of land near the Reform School which he would exchange for the 30 acres, and threatened that, if he commenced a suit to set aside his deed, he would prolong the litigation until the expenses of the trial would leave nothing for him; that the witness, hiring a horse and carriage, took the defendant to the land which he offered to trade, and they perfected a bargain in relation thereto, whereby the plaintiff paid on account of the land the sum of \$12, and gave the defendant \$10 for drawing the deed therefor; and that he erected a small house, and made other improvements on the premises.

The defendant, as a witness in his own behalf, testified that the agreement entered into required him to execute deeds for the lands mentioned in Lane and Marion counties, and to pay the further consideration of \$130, in exchange for the plaintiff's deed; that, in examining the title to the plaintiff's land, he discovered a defect therein which could only be corrected by securing quitclaim deeds from former owners of the premises, whereupon it was stipulated that the land in Lane County only should be conveyed, and that the legal title to the land near the Reform School should be retained until such defect was remedied. The defendant denied that he made any representations to the plaintiff concerning the location or kind of land mentioned in Lane County, telling Owings that he had never seen it, and advising him to examine the premises before he executed his deed; but he declined to do so. He also denied that the plaintiff paid him any sum as a consideration for the land near the Reform School, or gave him \$10 for executing a deed therefor; but admits that Owings paid the livery bill for the horse and carriage used in going to the land. Boss, as the defendant's witness, corroborates Turner's testimony in every particular, relating to the terms of the contract entered into when the exchange of lands was effected. Notwithstanding such confirmatory testimony, we think the inadequacy of the consideration, hereinafter referred to, when considered in connection with the

plaintiff's mental weakness, which his physical condition denoted, together with certain facts and circumstances associated with the whole transaction, sufficient to create an inference that the defendant exerted an undue influence over the plaintiff in scuring his deed, which prevented him from judging accurately and acting independently in the matter: *Archer v. Lapp*, 12 Or. 196 (6 Pac. 672). This deduction, which the law directs in such cases, imposed on the defendant the burden of showing that the plaintiff acted knowingly, intentionally and deliberately, with full knowledge of the nature and effects of his acts, and that his consent to the execution of his deed was not obtained by any advantage taken of his condition: 2 Pomeroy, *Equity*, 2 ed. § 928.

5. This inference has not, in our opinion, been overcome by the corroborating testimony mentioned. It conclusively appears that the land conveyed by the plaintiff was, at the time the deed was executed, reasonably worth the sum of \$1,200. The court found that the value of the personal property transferred by him to defendant was \$50, which conclusion of fact we adopt. The depositions of the witnesses who live near the land in Lane County conveyed to the plaintiff, and who know the character thereof, are to the effect that the premises have been burned over, destroying the timber; that the soil is rocky, the surface too steep to be plowed; and that the land is wholly valueless. A witness for the defendant, however, who had hunted deer on this land, estimated it to be worth from \$6 to \$10 an acre. In attempting to harmonize this testimony, if it be assumed that this land is worth \$6 an acre, the lowest estimate placed thereon by the defendant's witness, the value thereof is \$180, though the trial court found it to be reasonably worth only \$75. The witnesses who have recently seen the land near the Reform School testified that it is gravelly, subject to overflow, and that about three acres thereof having been plowed, the alluvial soil thereon had been washed away, so that the whole tract was of no greater value than from \$15 to \$25 an acre, at which latter sum the premises are worth \$182.75, though about six years prior to the trial the land had been

sold for \$60 an acre. The answer admits that the value of the permanent improvements which the plaintiff placed on the land near the Reform School is \$25, so that the entire consideration which he received for his real and personal property and improvements, valued at \$1,275, was the land in Lane and Marion counties, of the reasonable value of \$180 and \$182.75, respectively, and \$130 in money, or \$495.75. On account of the sum of money so received, the plaintiff transferred personal property worth \$50, and made improvements admitted to be of the value of \$25, and was required, as a condition precedent to the granting of the relief sought, to pay the further sum of \$50, which accounting we approve.

6. When this suit was instituted the plaintiff's counsel understood from their client that he had executed to the defendant a deed to the land in Lane County when he had only left the deed with him. Based on such misconception, a deed to the land near the Reform School only was tendered before the suit was commenced. At the trial, however, when the fact was ascertained, a deed to the land in Lane County was executed by the plaintiff and tendered. In view of Owings' mental condition and of the reasonable misunderstanding of his counsel resulting from his infirmity, the tender was sufficient.

Believing that the plaintiff is competent to execute to the defendant valid deeds of the real property which he received, and that a reconveyance of the premises will place him *in statu quo* upon the payment of \$50, the decree is affirmed.

AFFIRMED.

Argued 9 October, decided 30 October, 1906.

HAINES v. CONNELL.

87 Pac. 265, 88 Pac. 872.

PRIORITY BETWEEN ATTACHMENT AND UNRECORDED DEED.

1. An attachment levied in good faith on land that has been conveyed for more than five days without the instrument being recorded, and without knowledge of such conveyance, takes precedence of such conveyance, under Sections 302 and 5359, B. & C. Comp., relating to attachments and the recording of deeds.*

*NOTE.—Section 302, B. & C. Comp., reads thus: "From the date of the attachment until it be discharged or the writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith and

SUFFICIENCY OF SHERIFF'S CERTIFICATE OF ATTACHMENT.

2. Under Section 301 of B. & C. Comp., requiring a sheriff, after levying an attachment, to deliver to the county clerk a certificate containing the title of the cause, the names of the parties, a description of the property seized, and a statement that the same has been attached, such a certificate may be sufficient, though it does not contain as a caption the title of the cause or the names of the parties, if such matters appear in the body of the certificate.

CERTIFICATE OF ATTACHMENT—NEED OF CORRECT CAPTION.

3. If it is attempted to give the title of a cause and the names of the parties in a caption to a certificate of attachment, it must be given correctly or the certificate will not be valid.

PRIORITY BETWEEN ATTACHMENT AND DEED—PLEADING GOOD FAITH OF CREDITOR AS AN AFFIRMATIVE DEFENSE.

4. In a suit involving the relative rights of an attaching creditor and the holder of a deed to the same land, the creditor must plead affirmatively that the attachment was levied in an attempt to collect a genuine debt and without notice or knowledge of the interest of the deed claimant; it will not be sufficient to rely on a denial of the charge by the deed claimant that the attachment was levied with notice of the deed.

PLEADING—ADMISSION BY FAILURE TO DENY.

5. This case affords an illustration of the general statutory rule, B. & C. Comp., § 95, that affirmative allegations not denied are to be taken as true. A deed not having been recorded, an attachment was levied on the land as that of the grantor, whereupon the grantee sued to restrain further proceedings under the attachment, and for a cancellation of the same as a cloud on his title, alleging that the defendant had notice of plaintiff's claim to the property at the time the attachment was levied. The answer denied the allegations of the complaint, and also set up facts showing defendant to be a *bona fide* purchaser. These facts were not denied by reply. *Held*, that, the facts showing defendant to be a *bona fide* purchaser were admitted.

ATTACHMENT CERTIFICATE—NECESSITY OF CAPTION.

6. A sheriff's certificate of attachment of real estate, which recites in the body thereof the names of the respective parties in the cause and the title of the court from which the writ issued, is sufficient without having a caption stating the title of the cause and the names of the parties, or any caption whatever: *McDowell v. Parry*, 45 Or. 99, distinguished.

From Washington: THOS. A. McBRIDE, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by E. W. Haines against J. W. Connell, sheriff, and J. F. Schoch to remove a cloud from a title, and comes here on an appeal from a decree in favor of the plaintiff.

for a valuable consideration of the property attached," subject to the statute providing for recording certificates of attachment.

Section 5359, B. & C. Comp., reads thus: "Every conveyance of real property within this state, which shall not be recorded within five days thereafter shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded."

REPORTER.

On April 22, 1902, F. T. Kane was the owner of the S. E. quarter of section 11, township 2 N., range 5 W. On that day he attempted to convey the same by warranty deed to the plaintiff, but, by mistake, the land was described as being in range 4 instead of 5. The deed was not recorded until July 11, 1904, and about that time plaintiff discovered the mistake in the description, and, after having it corrected, had the deed re-recorded on July 19th. The land was and is wild land, and not in the possession of any one. On July 1, 1904, before the deed to Haines had been recorded, the defendant Connell's predecessor in office, as sheriff of Washington County, levied, or attempted to levy, upon the property under a writ of attachment issued in an action brought against Kane by J. F. Schoch, by making and filing in the proper office a certificate of attachment as follows:

"State of Oregon,

County of Washington—ss.

I, J. W. Sewell, Sheriff of Washington County, Oregon, do hereby certify that by virtue of a writ of attachment issued out of the Circuit Court of the State of Oregon for the County of Washington, upon the 30th day of June, A. D. 1904, in a cause therein pending, wherein J. F. Schoch is plaintiff and F. T. Kane is defendant, said writ being in favor of said plaintiff and against the property of said defendant, and directed to me, the Sheriff of Washington County, I did on the 1st day of July, 1904, at the instance of the above-named plaintiff, attach the following described real property of the within named F. T. Kane, to wit: Lot 1, block 31, Forest Grove; lot 9, block 1, West Portland Heights; southeast quarter of section 11, township 2 north, range 5 west of Willamette Meridian, all said property being in Washington County, Oregon.

In Witness Whereof I have hereunto set my hand this 1st day of July, A. D. 1904, at 10 o'clock a. m.

J. W. Sewell,

Sheriff of Washington County, Oregon."

The plaintiff thereafter, and before the action of *Schoch v. Kane* had passed to judgment, commenced this suit to enjoin and restrain the defendants from further proceeding under the attachment, and for a decree canceling the same, on the ground that it tended to cloud his title. The complaint alleges that the

defendants had notice of the plaintiff's interest at the time of the levy of the attachment. This averment is denied by the answer. For an affirmative defense the answer sets up the attachment proceeding in detail, and alleges that the attachment was caused to be levied by Schoch, the attaching creditor, in good faith, and without notice that the property had been transferred to the plaintiff, or to any other person, or that plaintiff claimed any interest or title, legal or equitable, therein. This allegation is not denied by the reply, and there was no evidence given on the trial by either party concerning a knowledge or want of knowledge of plaintiff's interest in the property by the attaching creditor at the time of the attachment. Plaintiff had decree in the court below, and the defendants appeal. REVERSED.

For appellants there was a brief over the name of *W. M. Langley & Son*, with an oral argument by *Mr. Lotus Lee Langley*.

For respondent there was a brief over the names of *W. H. Hollis* and *Samuel Bruce Huston*, with an oral argument by *Mr. Huston*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

It is contended by defendants that the deed from Kane to the plaintiff was intended as a mortgage to secure the payment of money, and therefore conveyed no interest or title in the property to Haines, and hence will not support a suit to remove a cloud from title; and also that this suit was prematurely brought because the action of *Schoch v. Kane*, in which the writ of attachment issued, had not passed to judgment at the time it was commenced. In view of the conclusion we have reached as to the merits of the controversy, it is not necessary to examine these questions, although they are important.

1. The deed from Kane to the plaintiff had not been recorded at the time of the levy of the attachment issued in the action of *Schoch v. Kane*, and more than five days had elapsed since the date of its execution, and, therefore, the attachment, if valid, will take precedence over such deed, if such attachment was made in good faith and without notice of plaintiff's rights:

Boehreinger v. Creighton, 10 Or. 42; *Riddle v. Miller*, 19 Or. 468 (23 Pac. 807); *Meier v. Hess*, 23 Or. 599 (32 Pac. 755); *Dimmick v. Rosenfeld*, 34 Or. 101 (55 Pac. 100); *Osgood v. Osgood*, 35 Or. 1 (56 Pac. 1017); *Security Trust Co. v. Loewenberg*, 38 Or. 159 (62 Pac. 647).

2. It is claimed, however, that the attachment is void, because the certificate of the sheriff, as filed with the county clerk, did not contain as a caption thereto the title of the cause or the names of the parties. The statute provides:

"Real property shall be attached as follows: The sheriff shall make a certificate containing the title of the cause, the names of the parties to the action, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff; and deliver the same to the county clerk of the county in which the attached real estate is situated:" B. & C. Comp. § 301.

The certificate in question admittedly contains in the body thereof all the essential requirements of the statute. It states the title of the case by giving the name of the court in which the action was pending, the names of the parties, a description of the property attached, and states that it was attached at the instance (which is equivalent to suit) of the plaintiff, and is, therefore, in our opinion, sufficient. There is no requirement in the statute that the title of the cause and the names of the parties shall be stated as a heading or caption to the certificate, as required by Section 67 in the case of a complaint. The statute provides that a complaint shall contain (1) the title of the cause, specifying the name of the court and the names of the parties plaintiff and defendant; (2) a plain and concise statement of the facts constituting the cause of action; and (3) the relief demanded; which would seem to contemplate that these requisites should be stated in the order named, notwithstanding which it has been held that the stating of the names of the court and of the parties in the caption of a complaint is a formal, and not a jurisdictional, matter: *Adams v. Kelly*, 44 Or. 66 (74 Pac. 399); *Smith v. Watson*, 28 Iowa 218; *Hill v. Thaxter*, 3 How. Prac. (N. Y.) 407; *Van Namee v. Peoble*, 9 How. Prac. (N. Y.) 198. The statute regulating the attachment of real

property provides what the certificate shall contain, but does not require that the essential matters shall be set out in any particular order, and it seems to us that a certificate is clearly sufficient which states such matters in the body thereof without giving to it the formality of a heading or caption.

3. When a certificate of attachment attempts to state the title of the cause and the names of the parties in a caption, it must state them correctly, and an error therein is not cured by a subsequent recital in the body of the certificate: *McDowell v. Parry* 45 Or. 99 (76 Pac. 1081). But where no caption is used, it is enough if the essential facts required to be stated appear in the body of the certificate.

4. It is next contended that the burden was on the defendants to show that the attachment was levied in good faith, and without notice or knowledge of plaintiff's interest in the property, and this seems to be the logical effect of the former decisions of this court: *Rhodes v. McGarry*, 19 Or. 222 (23 Pac. 971); *Laurent v. Lanning*, 32 Or. 11 (51 Pac. 80).

5. But here the defendants have assumed such burden by stating in their answer facts necessary to make them purchasers in good faith, and these allegations are not denied by the reply. The want of such denial is an admission of their truth, and no proof was required. It is said that because the complaint alleges that the defendants had notice of the plaintiff's claim to the property at the time the attachment was levied, and this averment is denied by the answer, the question of defendants' good faith was thus made an issue in the cause, and it was not necessary for plaintiff to deny the affirmative plea of a bona fide purchaser set up by the answer. The denial of the averments of the complaint did not entitle defendants to make the defense of a bona fide purchaser. That was an affirmative matter which they were required to plead in their answer, notwithstanding the allegations of the complaint: *Rhodes v. McGarry*, 19 Or. 222 (23 Pac. 971). And since they were required to plead facts constituting them bona fide purchasers, it would necessarily follow that such facts must be regarded as true, unless denied by

the plaintiff, and an averment of the complaint cannot be treated as such a denial.

It follows from these views, that defendants' attachment takes precedence over the rights acquired by the plaintiff by his deed from Kane, and the complaint must be dismissed.

REVERSED.

Decided 26 February, 1907.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE BEAN delivered the opinion.

6. Counsel is in error in supposing that the court held that the requirement of the statute that a certificate of attachment should contain the title of the cause is a nullity. The holding is that such a certificate, if without a caption, is sufficient if it contains in the body thereof "the title of the cause and the names of the parties," and otherwise complies with the statute. In short, that it is not necessary that the certificate should have a caption stating the title of the cause and the names of the parties, but it is enough if it contains in the body thereof all the essential requirements of the statute. Nor does the decision conflict with *McDowell v. Parry*, 45 Or. 99 (76 Pac. 1081). In the *McDowell* case it was held that, where a certificate of attachment purports to state the title of the cause and the names of the parties in a caption, it must state them correctly; and a failure to do so is fatal to the attachment. This case holds that, where no caption is used, the certificate is sufficient if the essential facts required by the statute appear in the body thereof.

The petition for rehearing is denied.

REVERSED: REHEARING DENIED.

Argued 10 October, decided 21 November, 1906.

PUFFER v. AMERICAN INSURANCE COMPANY.

87 Pac. 523.

REFERENCE—RIGHT OF JUDGE TO ACT AS REFEREE—WAIVING JURY.

1. A trial judge has no authority to act as a referee in a law action without the consent of the parties, nor to try a law action alone, unless a jury is waived in the manner provided by statute.

DELAYED REPORT OF REFEREE—REMEDY—RIGHT OF PARTIES TO TRIAL
BY REFEREE AFTER REFERENCE.

2. Where a report of a referee in a law action is unreasonably delayed the judge may order the report filed and enforce obedience to his orders by appropriate means, but he cannot himself decide the case on the testimony taken by the referee, against the objection of a party, as the statute gives the right to a trial in law actions either by a jury or a referee, and there are some material advantages under that right of which a party cannot be arbitrarily deprived.

From Multnomah: MELVIN C. GEORGE, Judge.

Action for the recovery of money by W. C. Puffer and Frank E. Dooley against the American Central Insurance Co. The other facts appear in the opinion. REVERSED.

For appellant there was an oral argument by *Mr. Milton W. Smith*, with a brief to this effect.

I. It was error for the court to disregard its rule requiring that "copies of all papers filed in a case must be served on the attorney of the adverse party"; and that "motions and issues of law shall be set down for hearing on the motion book." Rules of procedure adopted by a court have the force of law and must be strictly adhered to by both court and litigants: *Coyote G. & S. M. Co. v. Ruble*, 9 Or. 121, 125; *District of Columbia v. Roth*, 18 D. C. App. 547, 551; *Rio Grande Irrig. Dist. v. Gildersleeve*, 174 U. S. 603, 608 (19 Sup. Ct. 761); *Elevated Ry. Co. v. O'Neill*, 25 Ill. App. 313, 326.

II. Irrespective of the rules of court, it would be error to allow such a motion upon an *ex parte* application. Opposing counsel should be allowed an opportunity to be heard by affidavits and arguments: *Seamans v. Pharo*, 4 N. J. Law, 143; *Freeborn v. Denman*, 8 N. J. Law, 116, 119; *Ferris v. Munn*, 22 N. J. Law, 161; *Beattie v. David*, 40 N. J. Law, 102; *Dexter v. Young*, 40 N. H. 130; *Jackson v. Ives*, 6 Hill, 260; Beach, Mod. Eq. Prac. § 683.

III. In any event, the motion should have been overruled when it appeared that the referee had not yet made his findings and conclusions, or stated his inability to do so: B. & C. Comp. § 166. The court and counsel were wrong in applying Sections 406 and 827 to law actions.

IV. If a referee unduly delays his report, the proper practice is to move for an order to speed the case (17 Enc. Pl. & Pr. 1031), and if the referee refuses to do so, the court has power to remove him or proceed by way of contempt: *Jeffers v. Hazen*, 69 Vt. 456; *Hawkins v. Brafford*, 1 Caines, 160; *Thompson v. Parker*, 3 Johns. 260; *Stafford v. Hesketh*, 1 Wend. 71; *Marias v. Leony*, 113 N. Y. 619; 3 Waite's Practice, 309.

V. The court should not have heard the case without a jury, for it had no authority to try any law action without a jury unless the parties waive their constitutional right in the manner provided by law: B. & C. Comp. § 157; *American Mtg. Co. v. Hutchinson*, 19 Or. 334, 340 (24 Pac. 515); *Johnston v. Shofner*, 21 Or. 111, 115 (31 Pac. 254); *Stroup v. Bridges*, 124 Iowa, 401 (100 N. W. 113).

VI. In law actions the only occasions when the judge may make findings of fact from the evidence taken by the referee is when he has set aside the findings: B. & C. Comp. § 168; *Liebe v. Nicolai*, 30 Or. 364, 371 (48 Pac. 172). In such cases the court disagrees with the referee as to the weight of evidence, but here he tried the case without a report having been filed. That may do in equity, but neither at common law nor under our statute is such a procedure authorized in a law action.

For respondent there was an oral argument by *Mr. Harrison Gray Platt*, with a brief over the names of *Cake & Cake, Ore L. Price and Platt & Platt*, to this effect.

1. The rules of the circuit court were intended to expedite and not to retard business, and the proposition here does not come under the rule, for no motion or issue of law was before the court —only the fact that the referee had not reached a decision after an unreasonable delay. Further, a court at all times retains control over its proceedings, and by analogy it has the same power to recall a case from a referee that it has to discharge a jury.

2. When the case came on for hearing the defendant did not object because no jury was provided, but protested solely because the reference had been summarily terminated, thereby

waiving all other objections. The cases of *Ladd v. Sears*, 9 Or. p. 247, and *Rogue River Min. Co. v. Walker*, 10 Or. 343, are instructive on this question of waiver.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action at law to recover money. After the issues had been made up, it was referred to a referee to "make and report findings of fact and conclusions of law," because the trial would involve the examination of a long account on both sides. The evidence was taken by the referee, but he failed or neglected to make and report any findings of fact or conclusions of law, and some three years after his appointment he was ordered by the court, on plaintiff's motion, without notice to the defendant, to return the record, including the testimony taken before him, which was done accordingly. The court thereupon, against the protest of the defendant, and over its objection and exception, proceeded to a trial of the cause without the intervention of a jury. Findings and judgment were made and rendered in favor of the plaintiff, and defendant appeals.

1. A trial judge has no authority to act as a referee in a law action without the consent of parties (*Dinsmore v. Smith*, 17 Wis. 20), nor to try such an action unless a jury is waived in the manner provided by statute: *American Mortg. Co. v. Hutchinson*, 19 Or. 334 (24 Pac. 515); *Wilkes v. Cornelius*, 21 Or. 345 (23 Pac. 473).

2. The constitution guarantees to every suitor in a law action the right to a trial by jury, and he cannot be deprived of this right by the court on its own motion, or that of his adversary, unless the issues involve the examination of a long account. In the latter case an action may be referred to a referee, "to hear and decide the whole issue, or to report upon any specific question of fact involved therein" (B. & C. Comp. § 161); but in such case the conclusions of the referee are to be deemed and considered as a verdict of a jury: B. & C. Comp. § 168. A litigant in a law action, therefore, is entitled, as a matter of right, to have the facts determined by a jury, or, if the cause is referable, the conclusions of a trier of facts, whose findings shall have the same

force and effect. The court may set aside the findings of a referee, and order a new reference, or find the facts and law itself, but it can only do so under the same circumstances in which it has authority to set aside the verdict of a jury (*Merchants' Nat. Bank v. Pope*, 19 Or. 35, 26 Pac. 622; *Liebe v. Nicolai*, 30 Or. 372, 48 Pac. 172); and where the evidence is conflicting, and the credibility of witnesses is involved, the referee's findings of fact will ordinarily not be disturbed unless palpably wrong: 17 Enc. Pl. & Pr. 1055. The verdict of a jury and the findings of a referee in a law action stand upon the same footing, and a litigant can no more be deprived of the benefit of the one than of the other. The court may set aside the verdict of a jury in a proper case, and order a new trial, and it may, for like reasons, set aside the conclusions of a referee, and find the facts and law itself; but it has no more right to assume the duties of a referee without the consent of a party than it can that of a jury. If the referee unreasonably delays his report, the court may direct him to speed the case, and, if he neglects to do so, may perhaps force a report by attachment, or it may remove him, and appoint another; but it cannot itself assume to discharge his duties. If it could lawfully do so, it could deny to litigants the benefit to be derived from the findings of the trier of facts, and the presumptions which attach to such findings.

It follows from these views that the court was in error in trying the cause over the objection of the defendant, and for such error the judgment is reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Argued 27 February, decided 3 April, rehearing granted 17 July, finally decided 21 November, 1906.

WOLFARD v. FISHER.

84 Pac. 850, 87 Pac. 530; 7 L. R. A. (N. S.) 991.

RAILROAD—RIGHT IN STREET WHEN CONSTRUCTED WITH CONSENT OF ABUTTING OWNERS—ESTOPPEL.

1. After a railroad track has been constructed with the consent of the abutting owners to its location, and has been maintained for many, say twenty, years, such owners cannot complain of its location, both because they are estopped by their consent and because the application for relief has not been seasonably made.

RAILROAD IN STREET—RIGHT OF PUBLIC TO USE—NUISANCE.

2. Where a railway switch, though used largely by defendant, is open to all persons for shipping purposes, it is a public track, and its presence in a public street does not constitute a nuisance per se.

From Marion: WILLIAM GALLOWAY, Judge.

Suit by J. Wolfard and others against A. W. Fisher, executor, to enjoin the continuance of a nuisance, resulting in a decree for defendant, from which this appeal is taken.

AFFIRMED.

For appellants there was a brief with oral arguments by *Mr. L. H. McMahon*.

For respondent there was a brief over the names of *L. J. Adams*, *W. E. Yates* and *G. G. Bingham*, with oral arguments by *Mr. Adams* and *Mr. Bingham*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This suit was brought in 1904 by the owners of property abutting on Water Street in the City of Silverton, and by persons engaged in business along such street, to enjoin and restrain the defendant from maintaining and operating on the street a switch or branch railroad from his flouring mill and warehouse connected therewith to the main line of the Oregon & California Railroad Co. a distance of about a quarter of a mile. This switch or branch road was built in 1881 by the Oregonian Railway Co., the grantor of the Oregon & California Railroad Co., under an agreement with the then owner of the flouring mill by which the latter was to obtain the right of way, furnish the ties, and pay the railway company \$1,000 in cash, and it has been used and operated ever since. For a short time after it was built, horses were used in moving cars over the road, but this was found to be impracticable and for more than 20 years prior to the commencement of this suit, cars have been moved by the engines of the railroad company. What is now Water Street was a county road at the time the switch or side track in controversy was built. All the property owners except two, along that portion occupied by the track joined in a petition addressed either to the railway company, asking it to build the road, or to

the county court, praying that a right of way along the county road be granted for that purpose.

The evidence tends to show that this petition was presented to the county court, but there is no proof that any action was taken thereon. Two or three years after the road had been built some controversy arose about the matter, and the county court was requested to order its removal, but did not do so. In April, 1894, and after the incorporation of the City of Silverton, an ordinance was duly passed by the common council, granting to J. W. Cochran, who then owned the flouring mill, a 10-year franchise to maintain and operate a railroad on Water Street from his mill to the main line of the Oregon & California Railroad Co., and in March, 1904, such franchise was extended for an additional 10 years. The plaintiffs' position is that the road was built and is maintained for the private use and benefit of the owner of the flouring mill and not for public purposes, and is therefore a nuisance, and an unlawful use of the street. The defendant, however, contends and alleges that the railroad in controversy belongs to the Oregon & California Railroad Co. and is maintained and operated by its lessee, the Southern Pacific Co., for public purposes, and that both of these companies are necessary parties to this suit. It is, we think, unnecessary to consider or determine either of these questions at this time. The road was built originally by the consent and at the request of the property owners along that portion of the county road occupied by it, and since 1894 has been maintained and operated under a franchise granted by the municipal authorities. It is used principally for the transportation of grain from the main line of the railroad company to the defendant's mill and of flour and other mill products from the mill to such main line, but there is evidence that the defendant owns and operates in connection with his mill a grain warehouse or elevator with a storage capacity of about 60,000 bushels, and that the road has been used for the transportation of hops, grain, building material and the like for parties other than the mill company. Whether this is such a public use as would have authorized the construction and maintenance of the road

in the street originally, without the consent of the owners of the abutting property, is not necessary to consider.

1. The track was built by the express consent of and at the request of the property owners, and neither they nor their successors in interest are now entitled to injunctive relief against it. A property owner who has expressly consented to the use of his own property or of the street in front thereof for purposes such as shown, is not entitled, after the road has been constructed and operated for 20 years, to an injunction against its further maintenance: 3 Elliott, Railways, §§ 949, 1096; 1 Lewis, Em. Dom. (2 ed.) § 120; 2 Wood, Railways, p. 792; *Burkam v. Ohio & Miss. Ry. Co.* 122 Ind. 344 (23 N. E. 799). Injunctive relief will only be granted when application therefor is seasonably made: *Midland Ry. Co. v. Smith*, 113 Ind. 233 (15 N. E. 256). The decree of the court below will therefore be affirmed.

AFFIRMED.

Decided 21 November, 1906.

ON REHEARING.

M. L. H. McMahon for appellants.

Mr. L. J. Adams and *Mr. G. G. Bingham* for respondent.

MR. JUSTICE HAILEY delivered the opinion.

2. On the rehearing in this case it was strenuously contended by the counsel for the plaintiff that the track in question is used for private purposes only, for the benefit of the defendant, and, being so used on a public street, is a public nuisance *per se*. The evidence, however, shows that, while the track is used largely by the defendant for shipping in grain for his mill and shipping out his products, it has also been used by others, including at least two of the plaintiffs, for shipping other products, such as lumber, shingles, brick, sand, hops and other freight, and is open to all persons for shipping purposes. Such being the case, it is clearly not a private track confined exclusively to the use of the defendant or any limited number of persons, and, being available to the public generally for shipping purposes, its use is a public one. The number of shipments made by different individuals or firms over a track is not the

criterion by which to judge whether or not it is a public track. The public or private character of a track or way depends upon the right of the public generally to its use and not upon the extent of the exercise of that right. If such right is confined to a limited number only, it is a private use and a private track, although such persons may use it an equal or unequal number of times each, while, if it is available to all the public who desire to use it for shipping purposes, it is a public use, although some one or more of the public may use it more frequently than others. As stated in *Phillips v. Watson*, 63 Iowa, 33 (18 N. W. 659), "if all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small": Elliott, Railroads (3 ed.) § 961; *Bridal Veil Lum. Co. v. Johnson*, 30 Or. 205, 210 (46 Pac. 790, 34 L. R. A. 368, 60 Am. St. Rep. 818); *Towns v. Klamath County*, 33 Or. 225, 233 (53 Pac. 604).

The former opinion sufficiently covers the only other point in the case, and we adhere to that opinion. The decree of the lower court will therefore be affirmed. **AFFIRMED.**

Argued 23 October, decided 21 November, 1906.

STATE v. JENNINGS.

87 Pac. 524, 89 Pac. 421.

COMPETENCY OF CONCLUSIONS—OPINION EVIDENCE.

1. Where the facts observed by a witness can be accurately stated to a jury, the evidence should be limited to such a recital and the witness should not be permitted to state his deductions from such facts.

For instance: A witness who saw the surroundings soon after a homicide by shooting should not be allowed to state his opinion as to the place from which the bullet came, where the conditions observed can be adequately described.

RESERVING GROUND OF APPEAL—QUESTION NOT RAISED AT TRIAL.

2. Objections to evidence not made when the exception is saved will not be considered on appeal.

Thus: An objection to certain questions because they show an attempt of a party to impeach his own witness, in violation of Section 850, B. & C. Comp., does not support an objection that the party has not laid a foundation of surprise.

RIGHT TO IMPEACH ONE'S OWN WITNESS.

3. Under Section 850, B. & C. Comp., a party may impeach his own witness by showing that on previous occasions the witness has made statements inconsistent with his present testimony, in order to offset any unfavorable effect of the present statements.

CONTRADICTING WITNESS BY PREVIOUS WRITTEN STATEMENT.

4. Where a witness denies the correctness of a writing purporting to contain a previous statement at variance with his present testimony, the impeaching evidence is not limited to the writing, but oral evidence may be received of what the witness actually said.

CRIMINAL LAW—STATEMENT BY DEFENDANT AS EVIDENCE.

5. A statement made by a witness called under Section 1261, B. & C. Comp., to testify before a district attorney sitting as a grand jury, is competent evidence though it is not complete, if the witness admits that it is correct as far as it goes.

SAME—INCONSISTENT STATEMENTS.

6. Declarations of defendant concerning the commission of the crime charged are admissible against him, to prove that he has made false or inconsistent statements regarding the crime, when followed by evidence of their falsity or inconsistency.

APPEAL—ERROR NOT PRESUMED.

7. Error on the part of a trial court is never presumed, the presumption being that evidence was received or excluded as required by law, unless the contrary appears.

EVIDENCE—DECLARATIONS OF THIRD PERSONS—HEARSAY.

8. In a criminal case testimony that a third person said he had committed the crime charged against defendant is incompetent, being hearsay.

CRIMINAL LAW—BILL OF EXCEPTIONS—AMENDMENT.

9. Where a bill of exceptions, through mistake has been so made up as not to state the truth, it may on proper showing and notice be amended *nuc pro tunc* at a subsequent term and before the hearing in the supreme court, but the state which has argued and submitted its cause on a bill of exceptions stating the truth may not obtain from the trial court by way of amendment a new bill after the case has been decided against it on appeal, for the purpose of arguing in a petition for a rehearing that the error shown by the original bill was harmless.

From Josephine: **HIERO K. HANNA**, Judge.

Statement by **MR. JUSTICE HAILEY**.

Jasper Jennings and his sister Dora were jointly informed against by the District Attorney of the First Judicial District of this state for the crime of murder in killing their father, Newton M. Jennings, on September 7, 1905, in Josephine County, Oregon. In January, 1906, he was tried separately, convicted of murder in the first degree, and sentenced to be hanged, and appeals to this court. Five assignments of error are specified, and two of these can properly be considered as one. The record before us is meager in the extreme for a case involving human life, and the bill of exceptions covers only 25 pages of type-written matter, and several of these pages are erroneously filled with arguments of counsel on both sides, ad-

dressed to the court upon questions of the admissibility of evidence, and properly form no part of the bill of exceptions, as no exceptions are based thereon. REVERSED.

For appellant there was a brief and an oral argument by *Mr. H. D. Norton*.

For the state there was a brief over the names of *A. M. Crawford*, Attorney General, and *A. E. Reames*, District Attorney, with an oral argument by *Mr. Clarence L. Reames*.

MR. JUSTICE HAILEY delivered the opinion.

1. The record discloses that the deceased was shot during the night while in his bed in one corner of a small room in his home, and that his two daughters, Dora and a younger sister, occupied a bed in the opposite corner of the same room. L. B. Wickersham, one of the first persons to arrive at the house after the discovery of the homicide, was called as a witness for the state, and after testifying that "the corner of the room was spattered with blood," was asked: "Was there anything in that to indicate the direction it traveled, or, taking the direction it traveled from his head, was there anything to indicate in that where the shot was fired from?" To this question the defendant objected as calling for the opinion of the witness on a matter exclusively for the jury to determine, and therefore incompetent. The objection was overruled and an exception saved, and the witness answered: "The blood being in the corner, of course the bullet must have been fired—from the position of the bullet and the position of the head, that is—opposite from the corner in which the blood was found, which would be probably 10 feet north from the door inside." This question clearly called for the opinion of the witness as to where the shot was fired from, and his answer shows that he so understood it. The district attorney evidently regarded the answer as a conclusion of the witness and not a detail of facts from which the jury could draw its own conclusions, for he immediately asked the witness to "describe to the jury the appearance there—well, the way the blood was spattered in the corner, giving them the conditions there so that they might arrive at a conclusion as to where this

shot was fired from." But the witness failed to do more than say the corner of the room was covered with blood and portions of skull. There is nothing in the record as to the position of the body, or the course of the bullet through the head, or the position of the head, or any other fact from which a conclusion could be drawn as to the direction or place from which the bullet was fired. These are all facts which could be sufficiently described and detailed to the jury so as to enable it to draw its own inference and conclusions, and in such cases opinion evidence is not admissible: *State v. Barrett*, 33 Or. 194, 196 (54 Pac. 807); *State v. Mims*, 36 Or. 315, 320 (61 Pac. 888). It was, therefore, error to permit the witness to give his conclusions as to the place from which the shot was fired. He should have been asked to detail the conditions as they were and the jury allowed to draw its own conclusions from the facts thus detailed. His conclusion as to where the shot was fired from, based upon what he saw, might be very different from that of the jury drawn from a description of the condition of the room, the position of the body, and other necessary facts upon which to base a conclusion.

2. John Evett, third cousin of defendant, and a witness for the state, who had testified at the coroner's inquest held over the body of Jennings on September 8, 1905, after testifying that he lived in a cabin near the house in which Jennings was killed, and that on the night of the killing he had heard the defendant let down and drive through some bars near his cabin, about 12 o'clock, also testified that he afterwards heard a shot that night and that it sounded in the direction of the house where Jennings was killed. He was then asked:

"Do you know what time it was?"

and answered,

"Well, sir, I imagine it was somewhere in the neighborhood of 4 o'clock; to the best of my knowledge; I could not say positive."

To show that he had, at another time, made a different statement as to the time when he had heard the shot fired, he was asked if he had not been called as a witness at the coroner's in-

quest September 8th, and was asked to identify his signature to the notes of his testimony made at the inquest, and did so, and was then shown the notes of his testimony taken by the coroner's clerk, which are copied into the record, as follows:

"Jno. Evett, Granite Hill, is sworn. Resides across road from house. Slept there last night. Saw him at Sill's barn at 7 p. m. Asked about Ryle. Stayed at house a few minutes. Chapin came later. Heard music and dancing until quite late. Heard shot fired about 12 o'clock. Heard team stop at bars and drive on. After that heard shot. Made quite noise. Sounded like shot. Heard no other noise. Was not quite awake. Nothing else heard. Only shot. Couldn't tell where. Report sounded in direction of house. Heard of no trouble with family. Don't know whether was drunk or not. Has 25-35 gun there in camp. Knows of no pistol. John Evett."

He was then asked about the time he heard the shot as stated in the notes of his testimony taken at the inquest, and said, in effect, that it was a mistake, and he was positive he did not say he heard the shot fired about 12 o'clock when he testified before the coroner. He also said that one Mert Sills had been requested to take down the testimony at the inquest and did so, and that when the statement in evidence had been presented to the witness it had not been read to him, but he had been told to "sign that right here; sign your name under this," and that he did so without reading it over. Thereafter the coroner, W. H. Flanagan, was called as a witness for the state, and, after testifying that he did not think the testimony of Evett taken at the inquest had been read by or to Evett before signing, and after having been shown such testimony, he was asked,

"That statement that he heard the shot about 12 o'clock—do you remember how that was in his testimony?"

An objection was interposed on the ground that the state was attempting to impeach its own witness and the question was incompetent, irrelevant and immaterial. The objection was overruled and exception allowed, and the witness answered:

"Why, it was as near as I can recollect: this was his evidence, and I asked him what time, if he heard any noise or shot or anything. He said about—along about that time of night. I asked him what time as near as he could judge. He said

something—he said it was 12 or about 12 o'clock, from what he could judge of the time he had been asleep; it was along about that time. I didn't know that it was put down just at 12, but I see here the clerk put the time at 12 o'clock. He said as near as I can recollect it was about as near as he could judge the time from the time he went to bed; it was about 12 o'clock or a little after, along there, but I see my notes here say 12."

It is contended on the part of the appellant that the court erred in admitting this testimony without some showing of surprise on the part of the state in the testimony of the witness regarding the time when he heard the shot, and further that the testimony of the witness having been reduced to writing, it was the only evidence which the court should have admitted of former statements of the witness. The first contention is untenable for the reason that no such objection was made on the trial to the admission of the testimony, the objection made being that it was not admissible because it was intended to impeach the state's own witness.

3. The record shows that on the night of the homicide the defendant started from his cabin about 6 o'clock in the evening with a horse and cart and drove down to his father's house where he stopped for a few minutes, got his overcoat, and during that time had some conversation with his sister Dora, and then drove on down the road through the bars near the witness Evett's cabin, and on to the Roberts place and spent the evening there, and came back during the night and drove by his father's house, passing through between 12 and 1 o'clock, and reached his own cabin between 12 and 2 o'clock, and there is no evidence that he left the cabin again that night, and his partner, Harvey, testified that they slept in the same bed. It was evidently the theory of the state, in view of these facts, that the homicide, if committed by the defendant, was committed about 12 o'clock at night, and the testimony of the witness that the shot was fired about 4 o'clock in the morning, was clearly prejudicial to the theory of the prosecution and affected the merits of the case, and under Section 850, B. & C. Comp., the prosecution had a right to show that the witness had made at other times statements inconsistent with his present evidence. As

stated in *Langford v. Jones*, 18 Or. 307, 326 (22 Pac. 1071), "the object of the section (850) was to prevent the party from being prejudiced by the evidence of his own witness."

4. It is urged, however, that the testimony of the witness Evett taken before the coroner, having been reduced to writing, no other evidence of his statement should have been permitted to go to the jury. Such written evidence, if admitted by the witness to be correct, would undoubtedly have been the best evidence of what he stated at the inquest, and would have excluded oral statements of his testimony: *State v. Steeves*, 29 Or. 85, 102 (43 Pac. 947). But the difficulty in this case is that the witness, while admitting his signature to the testimony taken at the coroner's inquest, said in effect that his testimony had not been correctly taken by the clerk, and it then became necessary to prove his statements by the evidence of some one who was present and heard him testify at the inquest. It also became necessary to prove that the testimony of the witness as taken by the clerk and shown in the statement signed by the witness was correct. If a witness admits that he made statements imputed to have been made by him as fully as claimed to have been made, further proof of the fact is unnecessary, but when the witness denies or does not directly admit that he made the statements, impeaching proof should be permitted to be given: *Illinois Cent. R. Co. v. Wade*, 206 Ill. 532 (69 N. E. 565); *Ray v. Bell*, 24 Ill. 444; *Atchison, T. & S. F. R. Co. v. Feehan*, 149 Ill. 202 (36 N. E. 1036). The witness in this case, having denied the correctness of the statements contained in the writing introduced to show that he had made a contradictory statement before the coroner's inquest as to the time he heard the shot, the statement of the coroner as to his testimony at the inquest was admissible: *Sullivan v. Jefferson Ave. Ry.* Co. 133 Mo. 5 (34 S. W. 566, 32 L. R. A. 167).

5. The third assignment of error is in the admission of the following written statement, made by the district attorney and signed by the defendant, whose signature was identified by the sheriff:

"Sept. 25, 1905.

I have heard my mother say lots of times that she wished my father was dead, and that he would be killed. She told him that the Bryson boys would kill him. She threatened him with Will and De Witt Bryson. I can't figure out any other way than that my mother had some one kill my father.

Jasper Jennings."

This was objected to as incompetent, irrelevant and immaterial. It appears from the record that when this instrument was offered in evidence the jury retired and the defendant testified in his own behalf before the court regarding the making of this statement, and, if his testimony, which is not contradicted, is accepted as true, there was much more said by him in his conversation with the district attorney than is contained in the statement, and in view of the powers conferred upon a district attorney under our present law, which practically give him all the powers of a grand jury (B. & C. Comp. § 1261), it would seem but fair to the defendant, when reducing his statements to writing, to state fully therein all that he said, so that, in case the statement should thereafter be used against him, it would include all of his statements to the district attorney, rather than the conclusions of that officer drawn from the statements of the defendant. In this case, however, the defendant admitted that he had said "exactly what is on the statement," but, as appears from his testimony before the court, several questions were asked him by the district attorney which do not appear in the statement, and would, with his answers thereto, somewhat alter its effect if he made them and they had been included in the statement. The statement, however, was not inadmissible because it did not contain all that he claimed to have said to the district attorney. While the record in the case shows that the statement offered was voluntary, we think, in so serious a case as this, involving the guilt or innocence of one charged with the gravest crime known to our law and punishable by death upon conviction, that the spirit of our laws and institutions, and the interests of justice to all, require the exercise of the greatest care and caution upon the part of a prosecuting officer, clothed as he is with so much power, in receiving and reducing to writ-

ten form any statements made to him by the accused, and that such writing should fully set forth all that the accused has said relevant to the crime charged, and avoid the statement of any conclusion such officer might draw from the oral testimony of the accused. The desire of a prosecuting officer to convict in any cause, however strong against the accused, should never cause him to disregard any of the benefits or privileges accorded to the defendant by the law.

6. The fourth alleged error is in the admission of the following statement, signed by the defendant, whose signature was identified by S. F. Cheshire, county clerk, before whom the defendant signed and swore to the same:

"VOLUNTARY STATEMENT OF JASPER JENNINGS.

Some time ago I was arrested. About two weeks after the murder of my father, Dora and I were coming to town in the buggy to see Norton about fixing up guardian papers. When we got to the Upper Fork of Louse Creek, just above the Forest Queen mine, I accused Dora of killing my father. She denies it for a long time, but about the time we got to the lower ford, at the gate, she broke down, crying, and told me all about the killing of my father. She said, 'I did kill father the night that you went down to see Blanch Roberts.' Then she made me promise not to tell any one about it. Then she asked me what made me suspicion her. I said, 'Dora, it looked suspicious to me from what you said before this happened that you should have done it.' I says, 'You told me the evening I went down to see Miss Roberts that father had been drunk for a day or two,' and she had stood it just as long as she was going to. She told me that there was some beer in the case in the kitchen, and told me to drink what I wanted of it and throw the rest away. She says, 'He has drunk about all of the God d—n stuff he is ever going to drink.' I opened a bottle, and took a small drink, and threw the bottle out of the door. I do not like beer and cannot drink it. When we were going to town in the buggy, Dora told me that she asked Jimmy, in the evening before she killed father, where my gun was. She said Jimmy told her that it was up in the cabin in the left-hand corner as you go in the cabin. She said: 'About 12 o'clock I went up to your cabin and "eased" in and got your gun, then went back home, and father was lying in the bed asleep. I put the gun up to his head and shot him. He never moved. I then jumped into bed and laid there until everything was quiet, and then got up and put on

a pair of your shoes and took the gun and went and hid it. I then went back to the house and took off both pairs of shoes, undressed, and put out the light, and went to bed. I slept until Jimmy woke me up next morning.' I am not sure whether she told me she put on the shoes before she went to the cabin or afterwards.

"As soon as I heard father was shot, my first or second thought was that Dora killed him, because she had a good many times in my presence threatened to kill him, and I took my pistol away from the house because I was afraid she would carry out her threats. I gave the pistol to brother John when he went away. About a week before father was killed, Dora asked me where my gun and pistol were. She did not at the time say what she wanted to do. The next day or so I asked her what she wanted with my gun and pistol, and she said she wanted them to protect the house and keep any one from stealing her money. After she told me she had killed father, I asked her what she did it for, and she said, 'Because I have (?) him and I thought he had some money.' I asked her if she got any money, and she said, 'No.' The same evening she told me about killing father. while we were going home, Dora asked me if I supposed any one suspicioned her, and I told her I had not heard anything about anything of the kind. When Moody came down to the jail the other day, he told me he was sure Dora killed my father. I asked Dora where she hid the gun, and she said: 'You will never see your gun or hear tell of it again. It is gone for good.' I asked her if she hid it in the shaft, or the creek, or the tunnel: but she never would tell me what she did with it. When Dora and I were coming to town, the day she told me about the murder, we overtook Mrs. Ryel and Mabel Ryel just the other side of the forks of the Jump-Off-Joe road and the Granite Hill road. When we caught up with these people, Dora would not talk with me any more about the murder. I have made the foregoing statement voluntarily and of my own free will, and no inducements or promises whatever were made to me by any one before I made the same. Jasper Jennings."

These statements signed by the defendant were offered to prove that the defendant had made at different times inconsistent or false statements regarding the commission of the crime charged. Declarations of a defendant concerning the commission of a crime for which he is being tried are admissible against him to prove that he has made false or inconsistent statements regarding such crime, when followed by evidence of their falsity:

Underhill, Criminal Ev. § 116; *People v. Arnold*, 43 Mich. 304 (5 N. W. 385, 38 Am. St. Rep. 182); *State v. Carroll*, 85 Iowa 4 (51 N. W. 1159); *Mora v. People*, 19 Colo. 262 (35 Pac. 179); *People v. Hughson*, 154 N. Y. 163 (47 N. E. 1092); *Walker v. State*, 49 Ala. 398; *Commonwealth v. Johnson*, 162 Pa. 71 (29 Atl. 280); *Smith v. State*, 29 Fla. 422 (10 South. 894); *State v. Oliver*, 55 Kan. 714 (41 Pac. 954).

7. The question, however, of the falsity or inconsistency of these statements is not before this court. That error, to be available upon appeal, must be made to appear affirmatively from the record and will not be presumed, has been so often held by this court that it is unnecessary to cite the many authorities so declaring. The statements received in evidence being admissible if false or inconsistent, and the record being silent as to the evidence of their falsity or inconsistency, this court cannot presume that no evidence was introduced to that effect, but, on the contrary, must presume that such evidence was given.

8. The proffered testimony of Blanch Roberts to the effect that Dora Jennings, codefendant not on trial, had told her that she, Dora, had committed the crime, was properly excluded: *Latshaw v. Territory*, 1 Or. 141; *State v. Drake*, 11 Or. 396, 402 (4 Pac. 1204); *State v. Fletcher*, 24 Or. 295 (33 Pac. 575).

There being error in the admission of the opinion testimony of the witness Wickersham, the judgment of the lower court will be reversed, and a new trial ordered.

REVERSED.

Decided 9 April, 1907.

ON MOTION FOR REHEARING.

PER CURIAM: 9. Since the decision of this case, and within the time to petition for rehearing, as extended on application of the state, there has been filed, without leave of the court, what is asserted to be an amended bill of exceptions, but which is substantially a new bill; and it is insisted that it now appears that the error discussed in the briefs and at the argument, and upon which the case was decided, was harmless. It is not claimed that the original bill was erroneous in any particular, or did not state the truth, but only that it did not state facts sufficiently in

detail—to amplify which was the purpose of the so-called amendment.

Where a bill of exceptions, through inadvertence or mistake, has been so made up as not to state the truth, it may, upon proper notice and showing, be amended *nunc pro tunc* at a subsequent term and before the hearing in this court so that it will accord with the real facts: *State ex. rel. v. Estes*, 34 Or. 196 (52 Pac. 571); *Bloch v. Sammons*, 37 Or. 600 (55 Pac. 438; 62 Pac. 290). It is doubtful whether this rule of practice, liberal as it is, supports the right in a party to obtain by way of amendment to a bill of exceptions a substantially new bill after the adjournment of the term: *Arvilla v. Spaulding*, 121 Mass. 505. But, however this may be, there is no law permitting a litigant, who has argued and submitted his cause on a bill of exceptions, which states the truth, to obtain from the court below by way of amendment practically a new bill, after the case has been decided, for the purpose of arguing in a petition for rehearing that the error shown by the original bill was harmless. A bill of exceptions, when settled, signed and filed, becomes a part of the record, and stands on precisely the same footing as any other record (*State ex. rel. v. Estes*, 34 Or. 196, 204, 52 Pac. 571), and it will not be claimed, we think, that, where parties have submitted a cause for decision on a record as made up, either of them can, after the decision, cause a new or amended record to be substituted so as to add to or take from the questions presented: 3 Cyc. 144; *Kerley v. Vann*, 52 Ala. 7.

The petition for rehearing is denied.

REVERSED: REHEARING DENIED.

Argued 9 October, decided 21 November, 1906.

WILMOT v. OREGON RAILROAD CO.

87 Pac. 528; 7 L. R. A. (N. S.) 202.

RAILROADS—LIABILITY FOR STOCK KILLED IN STATION GROUNDS—FENCES.

1. Section 5139, B. & C. Comp., making railroad companies liable for the value of stock killed by moving trains on or near its unfenced track, does not apply to station or yard grounds, within the limits of which fences are not required.

IDEM—QUESTION FOR COURT OR JURY.

2. Where it appears clearly that animals entered upon station grounds and were killed by moving cars, it is the duty of the judge to take the case from the jury as a question of law; but where, as in this case, the evidence is conflicting as to whether the point of entry is within the station grounds, the question should be submitted to the jury.

RAILROADS—EXTENT OF STATION GROUNDS.*

3. The depot or station grounds of a railroad company is the place where passengers get on or off the train, and where freight is loaded and unloaded, including all grounds reasonably necessary or convenient to that purpose, together with the necessary tracks, switches and turnouts thereon, or adjacent thereto, necessary for handling and making up trains, storage of cars, etc., and so much of the main track outside the switches as is necessary for the proper handling of trains at the station.

EFFECT OF DESIGNATING STATION GROUNDS.

4. Where grounds have been appropriated and set apart by a railroad company for station or depot purposes, such appropriation affords strong evidence that the boundaries so fixed are such as and no more than are necessary and proper.

RAILROADS—KILLING STOCK ON TRACK—CONTRIBUTORY NEGLIGENCE AS A QUESTION FOR THE JURY.

5. In an action against a railroad company for killing plaintiff's stock, the question whether plaintiff was guilty of contributory negligence in turning the stock out to graze on unenclosed lands near the depot, was for the jury.

From Multnomah: JOHN B. CLELAND, Judge.

Action by Frank Wilmot and others against the Oregon Railroad & Navigation Co. The facts appear in the opinion. Defendant had a judgment, and plaintiffs appeal. **REVERSED.**

For appellants there was a brief over the names of *George William Pyle Joseph* and *Thomas M. Dill*, with an oral argument by Mr. Joseph.

For respondent there was a brief over the names of *W. W. Cotton* and *Arthur Champlin Spencer*, with an oral argument by Mr. Spencer.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover the value of four horses killed by the moving trains of the defendant on an unfenced portion of its track, but which the plaintiffs claim and allege should have been fenced.

The complaint states a cause of action for common-law negligence, and also under the statute making a railway company

NOTE.—See 7 L. R. A. (N. S.) 202-216, for note on What Are Depot Grounds Within the Meaning of Fence Laws.

REPORTER.

liable for stock killed on an unfenced track. The court below, in accordance with the doctrine approved in *Harvey v. Southern Pac. Co.* 46 Or. 505 (80 Pac. 1061), required plaintiffs to elect upon which cause of action they would proceed, and they elected to rely upon the statutory liability. The defense is that the animals entered upon the track at the depot grounds of the defendant, and that plaintiffs were guilty of such contributory negligence in suffering and permitting them to run at large at the place where they were killed as will bar a recovery. The defendant owns and operates a railroad from Portland to the eastern boundary of the state. Bridal Veil is a station between Portland and The Dalles, used principally for the shipment of lumber. It consists of station grounds, a depot building, side tracks, switches and turnouts necessary and proper for the handling of the business at that point. A switch or side track used by it in the transaction of its business leaves the main track at a point 200 or 300 feet east of the depot building, and, passing south of such building, intersects the main track again about 1,800 feet west thereof. Along this side track are situated the planing mill, lumber yards, sheds and other buildings of the lumber company. In 1902, the defendant constructed on the north side of the main track a passing track 3,000 feet long which commence about 700 or 800 feet west of the depot building and opposite the lumber platform of the lumber company and extends about 2,200 feet east of the depot. About 100 feet east of this passing track the defendant constructed a cattle guard with fences connected therewith on either side. From this point east the track is fenced, but it is not inclosed between the cattle guard and the west end of the depot grounds. The plaintiffs live and are in business at Bridal Veil. On the evening of April 11, 1904, they turned their horses out to graze on the uninclosed lands south of the depot as they had been accustomed to do for some time. During the night the horses strayed onto the track of the defendant, and were killed by its moving trains. The evidence tended to show that the horses entered upon the track west of the east end of the passing track, but were run down and killed east of the cattle guard. The court below directed a nonsuit on

the ground that the place of entry was within the depot grounds of the defendant and at a place it was not required to fence.

1. The statute makes a railroad company liable for the value of stock killed by its moving trains, engines or cars, upon or near an unfenced track (B. & C. Comp. § 5139), and is broad enough to include animals killed at the depot grounds. It has, however, been held that the statute did not extend to depot grounds because the purposes for which they are used and the right of public convenience are inconsistent with the obligation to fence at that point: *Moses v. Southern Pacific Co.* 18 Or., 385 (23 Pac. 498, 8 L. R. A. 135); *Sullivan v. Oregon Ry. & Nav. Co.* 19 Or. 319 (24 Pac. 408).

2. The question for decision upon the trial, therefore, was whether the place where the animals of the plaintiffs entered upon the track of the defendant was within or without the depot grounds. If within the depot grounds, the plaintiffs cannot recover in this action; but if not, defendant is liable under the statute unless the plaintiffs were guilty of contributory negligence. The parties differ radically as to whether the question thus presented is one of law or of fact. The plaintiffs claim that it was a question of fact, and should have been submitted to the jury, while the defendant insists that it was a matter of law for the court. The rule is, we take it, that whether a railway company shall fence its track at its depot grounds is a question of law, and, if the testimony shows that animals entering upon such grounds are injured or killed by moving trains, the owner cannot recover under the statute, and the liability of the company is for the court: *Moses v. Southern Pac. Co.* 18 Or. 385 (23 Pac. 498, 8 L. R. A. 135); *Eaton v. Oregon Ry. & Nav. Co.* 19 Or. 371, 391 (24 Pac. 413); *Eaton v. McNeill*, 31 Or. 128 (49 Pac. 875); *Harvey v. Southern Pac. Co.* 46 Or. 505 (80 Pac. 1061). But it is often a disputed question as to whether a certain point constitutes a part of the depot grounds, and if the evidence is conflicting or different inferences may be drawn from it, the question is for the jury, and not the court. Mr. Elliott says: "While it is purely a question of law whether or not a railway company shall fence
(48th Or.—32)

at its depot grounds or at points where the erection of a fence would interfere with the company in transacting its business, it is a question of fact whether a certain point constitutes part of the depot grounds or whether the erection of a fence at any particular place would interfere with the company's employees in the performance of their duties." 3 Elliott, Railroads, § 1202.

In *Grosse v. Chicago & N. W. R. Co.* 91 Wis. 482 (65 N. W. 185), the unfenced portion of the right of way was half a mile in length and extended north beyond a switch which was 1,400 feet from the depot building. At a highway crossing a short distance south of the switch it was customary to load and unload freight. Between such crossing and the switch, plaintiff's colts came upon the right of way and were killed, and it was held that it was a question for the jury whether the place of entry was a part of the depot grounds. In *Rhines v. Chicago & N. W. R. Co.* 75 Iowa, 597 (39 N. W. 912), it was held that whether that part of the company's ground which was not the ordinary place of receiving or delivering freight but where freight of a single shipper was handled, should be left unfenced, was a question of fact for the jury. And, in *Dinwoodie v. Chicago, M. & St. P. Ry. Co.* 70 Wis. 160 (35 N. W. 296), it was likewise held to be a question of fact whether the defendant's right of way at a point 60 rods from the station building where there was a side track in addition to the main track was necessary and convenient and actually used for loading and unloading freight so as to make it a part of the depot grounds, thus relieving the company from the duty of fencing it. And in *Bean v. St. Louis, I. M. & S. Ry. Co.* 20 Mo. App. 641, it was ruled that where a cow was killed adjacent to a railroad station and at a place used by the railroad for switching purposes in connection with its station grounds, the court could not declare as a matter of law that the company was not bound to fence its track at that point. See, also, *Indiana Ry. Co. v. Hale*, 93 Ind. 79; *Chicago & E. I. Ry. Co. v. Modesitt*, 124 Ind. 212 (24 N. E. 986); *McDonough v. Milwaukee & N. Ry. Co.* 73 Wis. 223 (40 N. W. 806).

3. The depot or station grounds of a railway company is the place where passengers get on and off the trains and where

freight is loaded and unloaded, and includes all grounds reasonably necessary or convenient to that purpose, together with the necessary tracks, switches, and turnouts thereon or adjacent thereto for handling and making up trains. storage of cars, and the like, and so much of the main track outside the switches as is requisite for the proper handling of trains at the station: 3 Words & Phrases, 2005 *et seq.*; 9 Am. & Eng. Enc. Law (2 ed.), 367; *Grosse v. Chicago & N. W. Ry.* 91 Wis. 482 (65 N. W. 185); *Grondin v. Duluth So. S. & Atl. Ry. Co.* 100 Mich. 598 (59 N. W. 229).

4. And where grounds have been appropriated, surveyed and set apart by the railway company for station or depot purposes, it affords very strong, if not conclusive, evidence that their boundaries and extent are such as and no more than are necessary and proper; and their limits should not be curtailed or extended by the court or jury unless in a very clear case: 3 Elliott, Railroads, § 1194; *Chicago & G. T. Ry. Co. v. Campbell*, 47 Mich. 265 (11 N. W. 152); *McGrath v. Detroit, M. & M. Ry. Co.* 57 Mich. 555 (24 N. W. 854); *Rabidon v. Chicago & West. M. Ry. Co.* 115 Mich. 390 (73 N. W. 386, 39 L. R. A. 405).

Now, there was no evidence in this case that the place where the plaintiffs' horses entered upon defendant's track was within the limits of the station grounds as set aside and designated by the defendant, or within such grounds as hereinbefore defined, and therefore the court could not declare as a matter of law that defendant was not required to fence its track at such point. The north track constructed by the defendant in 1902, so far as the evidence shows, was intended to be used for the passing of trains, and was in no way connected with or necessary to the use of the depot grounds; nor indeed, that it was on such grounds. We think, therefore, that the question whether the point where the horses entered was within the depot grounds was a question for the jury, and should have been submitted to them.

5. A claim is made that plaintiffs were guilty of contributory negligence in turning their horses out to graze upon the unin-

closed lands near the depot, but whether this was such contributory negligence under the circumstances as will defeat a recovery was for the jury: *Moses v. Southern Pac. Co.* 18 Or. 385 (23 Pac. 498, 8 L. R. A. 135); 2 Thompson, Negligence, § 2004.

Judgment reversed and new trial ordered. **REVERSED.**

Argued 11 October, decided 4 December, 1906.

REED'S WILL.

PICKERING v. WINCH.

87 Pac. 763.

DOMICILE CONSIDERED.

1. The meaning of the word "domicile" considered.

DOMICILE—PRESUMPTION AS TO CHANGE—BURDEN OF PROOF.

2. A domicile once shown to have existed at a particular place is presumed to remain there, and the burden of proof is on the one claiming it to have been changed.

DOMICILE—RESIDENCE—INTENT TO REMAIN.

3. Residence is a fact to be considered in determining the place of domicile, but domicile cannot exist at a particular place without residence and an intent to remain there.

CHANGE OF DOMICILE.

4. Within the established rule as to the concurrence of events necessary to constitute a change of domicile, it must be held that Amanda Reed did not change her domicile from Oregon to California, though she did have a temporary residence in the latter state for several years.

VALUE OF STATEMENTS AS TO INTENTION OF RESIDENCE.

5. Casual statements as to the intent accompanying one's change of residence are of less value as evidence than deliberate business declarations or avowals to intimate friends and to relatives.

From Multnomah: **ARTHUR L. FRAZER, JOHN B. CLELAND**
and **MELVIN C. GEORGE**, Judges.

Statement by **MR. CHIEF JUSTICE BEAN.**

This is a contest over the probate in an Oregon court of the will of Amanda W. Reed, who died at Pasadena, California, in May, 1904. Mrs. Reed was the widow of S. G. Reed, deceased, and died without children. Her will was executed September 4, 1901, in this state, and recited that she resided at Portland. It disposes of real and personal property of more than \$1,250,000 in value, almost all of which is in Oregon. Its probate is contested on the ground, as claimed, that the court of primary jurisdiction is the superior court of Los Angeles County,

Cal., in which state the contestants allege that the testatrix was domiciled at the time of her death. Mr. and Mrs. Reed came to Oregon in 1854, and remained here until 1892, during which time they accumulated the fortune now in controversy. Mr. Reed's health failed in 1891, and at the instance and upon the advice of his physician he went to California to spend the winter, hoping the change would benefit him. His health not improving, he returned to Oregon in the spring of 1892, and then went to Europe to consult a specialist. He returned from Europe in the fall, and shortly thereafter he and his wife went to Pasadena, California, where the climate was considered better suited to his health and comfort than that of Oregon. They boarded a while at a hotel, and then purchased residence property, and removed their household effects and personal belongings from Portland to Pasadena. Mr. Reed's health growing worse, he died in Pasadena in 1895, and Mrs. Reed brought the body to Portland, where it was buried in Riverview Cemetery. During his absence from Portland, Mr. Reed made no material change in his business affairs, retained his residence property and large holdings in lands and city property and his investments and securities in this state, kept his bank account and deposits, his office and agent here to attend to his business. He also retained his connection as a director in several Oregon corporations, and his position as a member of the Water Committee of Portland and his fraternal affiliations. He never voted in California, nor assumed any of the duties and obligations of its citizenship. The taxes on his personal property, except, perhaps, such as he used for his immediate comfort and convenience, were paid in Portland and not in California. Save and except his bare residence in Pasadena, Portland was the center of his affairs, and they remained unchanged as to his business connection and civic obligations and duties. Mr. Reed left a will devising and bequeathing all his property, except some real estate in Massachusetts, to his wife, and suggested therein:

"Feeling as I do a deep interest in the future welfare and prosperity of the City of Portland, Oregon, where I have spent my business life and accumulated the property I possess, I would suggest to my wife that she devote some portion of my estate

to benevolent objects or to the cultivation, illustration or development of the fine arts of said City of Portland, or to some other suitable purpose, which shall be of permanent value and contribute to the beauty of the city and to the intelligence, prosperity and happiness of its inhabitants."

On November 18, 1895, Mrs. Reed petitioned the probate court of Multnomah County for administration upon the estate of her husband, reciting and stating in such petition that she was a resident of Portland. She was appointed executrix, and thereafter settled up the estate. She returned to California, and for a time lived in the residence formerly occupied by herself and husband. Some two or three years later she built a dwelling at Carmelita, Pasadena, on property purchased by her husband, and on which he had contemplated building. She continued to reside there until her death, making frequent visits to Portland. She made no change in the management of the business or the property, real or personal, to which she succeeded, except to have her husband's name removed from the office door and hers placed thereon. She retained her church connection in Portland, and made regular contributions for its support and to its charities. She kept her office, agent, bank account and deposits there, except a small amount from time to time to meet her current expenses. She made no investments in California out of her surplus proceeds, but retained her property interests and business of all kinds in Oregon as had been done by her husband. In numerous and sundry documents executed by her she declared herself to be a resident of Oregon temporarily residing in Pasadena, and in her will, which was several times changed and revised, she invariably made the same declaration of herself. By the terms of her will, after making bequests to divers persons amounting to \$230,000 and disposing of several small articles of personal property, she devised and bequeathed the remainder of her property for some 17 different charitable and literary purposes, the recipients of her bounty all being Portland institutions except three, and only one of them was in Pasadena. The bulk of her property was devoted to the founding and maintenance at Portland "of an institution of learning, having for its object the increase and diffusion of practical

knowledge among the citizens of said City of Portland, and for the promotion of literature, science and art," to be known as the "Reed Institute," in memory of her husband. She appointed a resident of Portland executor of her will, and residents of that city trustees to carry out its objects. The court below held that the legal domicile of Mrs. Reed was in Oregon at the time of her death, and her will was entitled to probate here. From this decree the contestants appeal. **AFFIRMED.**

For appellants there was a brief with oral arguments by *Mr. William Montgomery Gregory* and *Mr. James A. Gibson*.

For respondents there was a brief over the names of *Dolph, Mallory, Simon & Gearin, William P. Lord, Martin Luther Pipes* and *Stewart, Eliot & Williams*, with oral arguments by *Mr. Joseph Simon, Mr. Lord* and *Mr. Pipes*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. This contest arises out of the desire of a number of the heirs of Mrs. Reed to divert and circumvent her manifest intention and desire as to the disposition of her property by availing themselves of the provisions of a statute of California which makes void any devise or bequest for charitable uses in excess of a certain proportionate share of the estate of the deceased: 2 Kerr, Cyc. Code, § 1313. To accomplish this purpose they assert that Mrs. Reed was domiciled in California, and the disposition of her property was subject to its laws. The case, therefore, depends upon the single fact whether Mrs. Reed's domicile at the time of her death was in Oregon or in California. To make out their case, the contestants are bound to establish, either (1) that Mr. Reed changed his domicile, and by virtue of the marital relation, the domicile of Mrs. Reed, from Portland to Pasadena; or (2) that, if his domicile remained at Portland unchanged, Mrs. Reed, after his death, and when she became competent to choose and acquire a new domicile, changed her domicile from Portland to Pasadena. Domicile is difficult of accurate definition and the opinion has been expressed by many judges and writers that the term cannot be successfully defined so as to embrace all its phases. Mr. Justice SHAW says: "No

exact definition can be given of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case:" *Thorndike v. Boston*, 1 Metc. (Mass.) 242. Vice Chancellor KINDERSLEY observes: "With respect to these questions of domicile, there is no precise definition of that word, or any formula laid down by the application of which to the facts of the case it is possible at once to say where the domicile may be:" *Cockrell v. Cockrell*, 25 L. J. Ch. (N. S.) 730, 731; *Cockrell v. Cockrell*, 2 Jur. (N. S.) 727. Lord Chancellor HATHERLEY declined to "add to the many ineffectual attempts to define" the term: *Udny v. Udny*, L. R. 1 Sc. & Div. App. 441, 449. Mr. Jacobs and Mr. Dicey have both devoted many pages to a discussion of domicile and they each point out the variety of attempts to define it, and how futile have been the efforts: Jacobs, *Domicile*, § 56 *et seq.*; Dicey, *Conflict of Laws*, p. 79.

"Domicile," strictly speaking, is the relation the law creates between an individual and a particular place or country, and each case is dependent upon its own particular facts. It is not in a legal sense synonymous with "residence." A person may have more than one residence and more than one home, in the ordinary acceptance of those terms, but he can have only one domicile and the law requires that for the purpose of the succession of his property he be domiciled somewhere. The word "home" is undoubtedly the fundamental idea of domicile, though calling a place "home" as a matter of fact may not be and often is not entitled to much weight: Jacobs, *Domicile*, § 72. To constitute domicile there must be both the fact of a fixed habitation or abode in a particular place, and an intention to remain there permanently or indefinitely; or, as Mr. Wharton says: "There must be: (1) residence, actual or inchoate; (2) the nonexistence of any intention to make a domicile elsewhere:" Wharton *Conflict of Laws*, § 21. Domicile, therefore, is made up of residence and intention. Neither, standing alone, is sufficient for the purpose. Residence is not enough, except as it is co-joined with intent, which determines whether its character is permanent or temporary; and clearly a mere intent cannot create a

domicile. Mr. Dicey says: "The domicile of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether in fact his home or not, is determined to be his home by a rule of law." Dicey, *Conflict of Laws*, p. 79. This is considered by Mr. Jacobs, with, perhaps, one change, to be as nearly accurate a definition as has been given: Jacobs, *Domicile*, § 67.

2. But we need not pursue this branch of the question further. We are not so much concerned at this time with the correct technical definition of domicile as we are with the law regulating a change of domicile when once acquired. It is shown by the evidence and admitted by the contestants that Mr. and Mrs. Reed were domiciled in Oregon from 1854 to 1892—a period of nearly 40 years—and this domicile is presumed to have continued until it is shown that a new one was established, in intent and in fact, by indicating and carrying into effect an intention to abandon the Oregon domicile, and to establish another in California. Every person is assumed by the law to have one domicile and one only. And when this is shown to exist, it is presumed to continue until not only another residence and place of abode are acquired, but until there is an intention manifested and carried into execution of abandoning the original domicile and acquiring another by actual residence; and the burden of proof is upon the party who asserts the change: 10 Am. & Eng. Enc. Law (2 ed.), 3b, p. 14; 3 Cyc. 865; *Caldwell v. Pollak*, 91 Ala. 353 (8 South. 546); *Dupuy v. Wurtz*, 53 N. Y. 556; *Ennis v. Smith*, 55 U. S. (14 How.) 400, 423 (14 L. Ed. 472); *Isham v. Gibbons*, 1 Bradf. (N. Y. Sur.) 69; *Aikman v. Aikman*, 3 Macq. 852, 877; *Wanzer Lamp Co. v. Woods*, 13 Ont. Pr. R. 511.

3. Now, the principal fact upon which the contestants rely to show a change of domicile was the removal of the Reeds from Portland to Pasadena in 1892, and the residence of Mr. Reed there until his death three years later and Mrs. Reed's residence thereafter until her death in 1904. But residence alone is not sufficient for the purpose. Residence and domicile are not interchangeable terms. Domicile embraces more than mere residence. Residence denotes a place of abode, whether temporary or perma-

ment; while domicile denotes a fixed and permanent home, and need not be the actual place of abode. It does not depend upon mere naked residence, but "is the legal, the juridical seat of every person—the seat where he is considered to be in the eyes of the law, for certain applications of the law, whether he be corporeally found there, or whether he be not found there:" Jacobs, Domicile, § 63. This distinction is clearly recognized in the authorities.

In *Drevon v. Drevon*, 34 L. J. (N. S.) Eq. 129, Vice Chancellor KINDERSLEY, who has considered the subject of domicile in a number of cases, says with much force: "For example, the first act generally brought forward, and, of course, which is brought forward and relied upon in this case, is length of residence. Length of residence has in many cases, both by English and by foreign jurists, been considered a very important ingredient in the question, and, in other cases, it has been considered as of little importance; that is, as compared with and brought into connection and contact with other circumstances, of which evidence is given in the case. I think, with regard to that point, the true conclusion is this, not that any one act or any one circumstance is necessarily *per se* of vast importance and other circumstances of little importance, but it is a question what is the relative importance of the different acts, whether some acts tending one way are of greater weight than those tending the other as to the *animus manendi* or the *animus revertendi*, or the animus as to changing domicile." And Lord CHELMSFORD says in *Moorhouse v. Lord*, 10 H. L. C. 272: "In a question of change of domicile the attention must not be too closely confined to the nature and character of the residence by which the new domicile is supposed to have been acquired. It may possibly be of such a description as to show an intention to abandon the former domicile; but that intention must be clearly and unequivocally proved."

So also in *Gilman v. Gilman*, 52 Me. 165 (83 Am. Dec. 502), the court say: "A person may have two places of residence, for purposes of business or pleasure. But, in regard to the succession of his property, as he must have a domicile somewhere,

so he can have only one. It is not very uncommon for wealthy merchants to have two dwelling-houses, one in the city and another in the country, or in two different cities, residing in each a part of the year. In such cases, looking at the domestic establishment merely, it might be difficult to determine whether the domicile was in one place, or the other. * * If any general rule can be applied to such cases, we think it is this: That the domicile of origin, or the previous domicile shall prevail. This is in accordance with the general doctrine, that the *forum origines* remains until a new one is acquired. And this would generally be in harmony with the other circumstances of each case." And, again, in *Tipton v. Tipton*, 87 Ky. 245 (8 S. W. 440), it is said: "There is a broad distinction between a legal and actual residence. A legal residence (domicile) cannot, in the nature of things coexist in the same person in two states or countries. He must have a legal residence somewhere. He cannot be a cosmopolitan. The succession of movable property, whether testamentary or in case of intestacy, except as regulated by statute, the jurisdiction of the probate of wills, the right to vote, the liability to poll tax, and to military duty, and other things, all depend upon the party's legal residence or domicile. For these purposes, he must have a legal residence. The law will, from facts and circumstances, fix a legal residence for him, unless he voluntarily fixes it himself. His legal residence consists of fact and intention. Both must concur. And when his legal residence is once fixed, it requires both fact and intention to change it. As contradistinguished from his legal residence, he may have an actual residence in another state or country. He may abide in the latter without surrendering his legal residence in the former, provided he so intends. His legal residence, for the purposes above indicated, may be merely ideal, but his actual residence must be substantive. He may not actually abide at his legal residence at all, but his actual residence must be his abiding place."

So, in *Long v. Ryan*, 30 Grat. 718, the court say: "There is, however, a wide distinction between domicile and residence recognized by the most approved authorities everywhere. 'Domicile'

is defined to be a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. To constitute a domicile two things must concur—first, residence; secondly, the intention to remain there. Domicile, therefore, means more than residence. A man may be a resident of a particular locality without having his domicile there. He can have but one domicile at one and the same time, at least for the same purpose, although he may have several residences." And, again, in *Stout v. Leonard*, 37 N. J. Law, 492, it is said: "Residence is not domicile though domicile is the legal conception of residence. Domicile is residence combined with intention. It has been well defined to be a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. A man can have but one domicile for one and the same purpose at any one time, though he may have numerous places of residence. His place of residence may be, and most generally is, his place of domicile, but it obviously is not by any means necessarily so, for no length of residence without the intention of remaining will constitute domicile."

Other decisions might be referred to to the same effect, but these are sufficient to show the distinction between residence and domicile, and that mere change of residence is not of itself proof of a change of domicile unless accompanied by an intention, expressed or implied, to abandon the old domicile and acquire a new one. Within the principle of law declared in the decisions, a person may reside for pleasure or health in one place without forfeiting or surrendering his domicile or legal residence in another, if he so intends. It is not residence alone, but it is the intention of the person, expressed or implied from the facts in evidence, conjoined with residence, that determines domicile. Every person *sui juris* and capable of controlling his personal movements may change his domicile at pleasure, but a change of domicile involves intention as the dominant factor.

4. To constitute a change of domicile three things are essential: (1) Residence in another place; (2) an intention to abandon the old domicile; and (3) an intention of acquiring a new

one; or, as some writers express it, there must be an *animus non revertendi* and an *animus manendi* or *animus et factum*: *Berry v. Wilcox*, 44 Neb. 82 (62 N. W. 249, 48 Am. St. Rep. 706), *Hayes v. Hayes*, 74 Ill. 312, 316; *Jopp v. Wood*, 34 L. J. (N. S.) Eq. 212; *Moorhouse v. Lord*, 10 H. L. C. 272. The *factum* is the transfer of the bodily presence and the *animus* is the intention of residing permanently, or for an indefinite period. A change of domicile, therefore, involves a question of fact and intent. The fact is easily proved because it is shown by the mere transfer of the bodily presence from the old to the new place of abode, but the intent with which the change is made is to be determined from the character of the residence, its object and purpose, in connection with the other evidence in the case. Residence in a particular place is a fact obvious to the senses and cannot be easily mistaken, but its value in fixing domicile is unimportant unless accompanied with an intent of remaining permanently or indefinitely, or, as it is sometimes said, with no present intent of removing therefrom. Residence alone, however long continued, will not effect a change of domicile. On this point the authorities speak with practically one voice. In *Jopp v. Wood*, 4 DeG. J. & S. 616, TURNER, L. J., says: "Though the residence may be decisive as to the *factum*, it cannot, when looked at with reference to the *animus*, be regarded otherwise than as an equivocal act. The mere fact of a man residing in a place different from that in which he had been before domiciled, even though his residence there may be long and continuous does not of necessity show that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make the place his temporary home." And Mr. Justice RAPALLO says in *Dupuy v. Wurtz*, 53 N. Y. 556, 561: "One leading rule is that for the purposes of succession every person must have a domicile somewhere, and can have but one domicile, and that the domicile of origin is presumed to continue until a new one is acquired. * * To effect a change of domicile for the purpose of succession there must be not only a change of residence, but an intention to

abandon the former domicile, and acquire another as the sole domicile. There must be both residence in the alleged adopted domicile, and an intention to adopt such place of residence as the sole domicile. Residence alone has no effect *per se*, though it may be most important, as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two taken together do constitute a change of domicile."

The animus or intent is, therefore, as essential to a change of domicile as the fact of residence. To lose a domicile when once acquired, there must be an intention to do so. A mere change of the place of abode, however long continued, is not sufficient, unless the proper animus or intention is present. This intention, it is true, may be inferred from circumstances, and the residence may be of such a character and accompanied by such indices of a permanent home that the law will apply to the facts a result contrary to the actual intention of the party. Thus one cannot make a permanent fixed commercial residence with all the surroundings of a permanent home in one place and a domicile in another by a mere mental act. But a residence for mere pleasure or health is not regarded as of any great weight in determining the question of a change of domicile, for, in such case it is just as likely that the party intends to retain as to abandon his present domicile. The books abound in cases where absences for 20, 30 and even 40 years effect no change of domicile. *White v. Brown*, 1 Wall. C. C. 217 (Fed. Cas. No. 17,538); *Re Domingo Capdevielle*, 10 Jur. 1155; *Jopp v. Wood*, 4 DeG. J. & S. 616; *Hodgson v. Beauchesne*, 12 P. C. 285; *Cruger v. Phelps*, 21 Misc. Rep. 252 (47 N. Y. Supp. 61). And Sir John Dodson says in *Bremer v. Freeman*, 10 Moore, P. C. 306: "A person may live 50 years in a place, and not acquire a domicile, for he may have had all the time an intention to return to his own country." And Mr. Jacobs says: "Residence of itself, although decisive of the *factum* necessary for a change of domicile, is decisive of nothing further, and even when long continued, although *per se* evidence of intention will not supply its place. * * Intention must concur with fact,

and must clearly appear. On the one hand, the shortest residence is sufficient if the requisite animus be present, and, on the other, the longest will not suffice if it be absent:" Jacobs, Domicile, § 136.

The residence of Mr. and Mrs. Reed at Pasadena admittedly was for health and pleasure, and not business. It was, therefore, not of that permanent commercial or business character which will in law constitute a change of domicile regardless of the intention of the parties. Nor was it of such a character as will overcome the presumption that their former domicile at Portland continued. We must, therefore, look to the evidence to ascertain whether in fact they intended to abandon their Portland domicile and acquire a new one in California, and in doing so it is important to bear in mind their situation at the time of their removal, the causes which prompted it, its purpose and the place to which they removed. Mr. Reed was in failing health and had been compelled to cease active participation in his business affairs. It was necessary, as he thought, and as he was advised by his physicians, to seek a more congenial climate than that of Oregon. For this purpose he visited California, and after examining several places or localities, finally selected Pasadena, which, as one of the witnesses testified, is "a health resort." A large part of its population "come there and away again; two-thirds of it was temporary." "The temporary class is composed largely of people who come in search of health." To this character of a location Mr. and Mrs. Reed moved, because its climatic conditions and general surroundings would, it was thought, conduce to their personal comfort and the improvement of Mr. Reed's health. They did not make any investments in Pasadena except such as seemed to them necessary for their comfort and pleasure. Mr. Reed did not dispose of his Portland property, or make any change in his business affairs. He retained his office and bank account in Portland, and his entire conduct negatives an intention to abandon his Portland domicile or to acquire another. Mr. Reed's health did not improve, and he died in 1895, devising and bequeathing his property to his wife. Mrs. Reed con-

tinued to reside in Pasadena as before, without making any change in her business affairs or indicating in any way a purpose to change her domicile. She continued her church connection in Portland, making regular contributions for its support and to its charities. She described herself in numerous documents and in her will as a resident of Portland temporarily residing at Pasadena, and the very terms of the will itself indicate that she considered Portland as her home, and entitled to receive her charitable bequests. The acts of Mr. and Mrs. Reed, and the undisputed facts surrounding and characterizing their removal from Portland to California, and their subsequent residence in Pasadena, show to our minds quite clearly that they at all times deemed and considered their residence there as temporary rather than permanent, and that Portland was their legal domicile. The decided weight of the testimony as to their purposes as declared by them is to the same effect.

Mr. C. A. Dolph, who was the legal and confidential adviser of Mrs. Reed after the death of her husband, and who, perhaps, had a better opportunity to know her real intention than any other witness in the case, testified that he had numerous conversations with Mrs. Reed regarding the place of her permanent residence and that on every occasion when the subject came up she invariably gave it as Portland, and by her instructions she had been so described in the different wills that he had prepared for her; that when he came to prepare the petition for the probate of Mr. Reed's will in November, 1895, he inquired of Mrs. Reed as to her permanent residence because she was to verify the petition, and he knew Mr. Reed had been away from Portland a good deal for several years prior to his death, and at that time Mrs. Reed told him distinctly that Portland was their permanent residence and that

"They had always claimed Portland as their home, that the matter had been incidentally discussed with relation to the removal or change of residence of Captains Thompson and Ainsworth, Mr. Reed had spoken of that, and stated that their permanent home was in Oregon."

He further testified that he frequently visited Mrs. Reed at Pasadena professionally at her request, and on several occasions

suggested that it might be better for her to consult some resident lawyer and offered to recommend some one for that purpose, but that she invariably replied:

"I don't wish to do that. It is so hard to make people here understand that I do not belong here. My interests, what I have, my affections—I would not be sure that she said my home—but that was the significance of it, was in Oregon and not in California."

He had many conversations with her with regard to the disposition on the part of the people of Pasadena to induce her to aid in public charities and enterprises, and that on more than one occasion she told him that

"They did not understand that she was not interested in those things, not belonging to them, or not belonging there, but in Oregon. She put California, or Pasadena, and Portland, Oregon, in juxtaposition a good many times and principally in urging her objection to having an adviser there, and transferring a portion of her business there, and it came up in regard to her bank account, as to having a bank account or an office there, she always answered that her office was here and her business was here, and her affections were here."

He also says that she always spoke of Oregon as her home, and so far as her intentions were concerned he never had a suspicion that it was claimed by anybody that Portland was not her permanent home; that every expression of hers to him, whether drawn out for the purpose of obtaining information from a legal standpoint, or in a social way, was to that effect.

Mr. James Patterson, a resident of Pasadena, who became acquainted with and frequently visited the Reeds after their removal to that city, testified that Mr. Reed was regarded as a temporary resident, and that he came to Pasadena for his health; that after Mr. Reed's death Mrs. Reed frequently referred to Oregon as her home, and that on one occasion he suggested to her that she had lived in Pasadena long enough to become a Californian and she replied: "Oh, no! I will never become a Californian. Oregon is my home. I was raised there and grew up with the country." Miss Stevens, who was the maid of Mrs. Reed from January, 1900, to October, 1902, testified that Mrs. Reed always spoke of Portland as her home, and

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when they were planning to make visits to Oregon as they frequently did, Mrs. Reed would say: "Well, we are going home this summer"; that in April, 1904, she told witness that her physician thought that the climate at Pasadena did not agree with her, and that it might be necessary for her to make a change, and she said: "If so, I will go back to my home in Portland."

Mrs. Martin Winch, who was regarded practically as a daughter by Mrs. Reed, and with whom she talked frankly and freely, testified that the Reeds went to California on account of Mr. Reed's health; that after Mr. Reed's death she (witness) was with Mrs. Reed practically all the time up to her death except during the summers of 1900 and 1903; that witness always understood that Mrs. Reed's permanent home was in Portland, and never thought anything else; that Mrs. Reed always kept up her dues in the Ladies' Relief Society and in the Unitarian Church of which she remained a member, and when solicited to contribute to Pasadena charities, she would say: "That is not my church. My church is in Portland. I give to my church just as I always did"; that Mrs. Reed loved Carmelita dearly but always spoke of it as Carmelita, and witness never heard her refer to it as home; that witness never heard her in any shape or manner say that Pasadena was her home for the rest of her life or all the time, but often heard her refer to Portland as her home; that she often talked about California and Oregon people, and witness had frequently heard her say that the people of Pasadena did not seem to understand why she would not take the same interest in their charities and social affairs as she did in Portland, but she said: "That I do not do. Portland is my home. That is where I am interested, and what I want to do I want to do there"; that when people would come to her in Pasadena and solicit contributions she would say: "Why, I have no business here. My business, my office is in Portland and my business agent is there"; and that so far as witness knew Portland is the place she always spoke of as her permanent home. Mr. Martin Winch, a nephew of Mrs. Reed and her confidential agent and business manager, and that of her husband during the latter part of his life, and who, consequently, was

familiar with her intentions, testified that he always looked upon Mrs. Reed's residence in California as temporary, and thought that she regarded it the same; that he never heard anything to the contrary, and never supposed that she had any permanent residence but Portland.

The contestants have the testimony of numerous witnesses as to alleged declarations made by Mrs. Reed concerning her home and some letters written by her to relatives and friends. In many of these letters Mrs. Reed expresses her appreciation of the climate of Pasadena, its flowers and fruits, and in some of them refers to Carmelita as home, but there is nothing in any of them to indicate that she used the word "home" in any other sense than as referring to a temporary residence. It is not necessary to cite authorities or enter into an argument to show that the word "home" is very frequently used with reference to a place other than the legal and permanent domicile, but it would be quite natural for Mrs. Reed, who manifestly enjoyed her beautiful residence in Pasadena, to refer to it as her home in a casual conversation and in friendly letters. The oral testimony consists principally of the evidence of interested witnesses who undertake to relate statements alleged to have been made by both Mr. and Mrs. Reed to the effect that they never intended to return to Portland to live; that Pasadena was their home, and that they expected to live there during the remainder of their lives. It is not necessary to prolong the opinion by referring to this evidence in detail. We have read it with care. The declarations, or most of them, are claimed to have been made many years ago, and in the course of casual conversations, or in answer to questions, and are entitled to but little weight. Such testimony is admissible in cases of this character, but it is considered by courts as of the lowest species of evidence, especially when, as in this case, it encounters conflicting declarations. Such expressions or declarations are so much influenced by the circumstances under which and the person to whom they are made, and the state of the temper at the time, that they cannot be safely relied upon when they conflict with each other, or are inconsistent with the actions and conduct of the parties.

5. In *Moorhouse v. Lord*, LORD CHELMSFORD, in referring to similar evidence, said: "There are proved on this occasion, as there usually are in such cases, written and oral declarations which conflict with each other. I lay no great stress, as your Lordships probably would not incline to do, upon casual expressions of preference for one country over another at different periods. The feelings at the moment may dictate them, or the changing circumstances of life; even a change of weather, the difference between a bright and gloomy day, may make all the difference in the expression of attachment to one place or to another; but I do lay very considerable stress upon declarations made to parties to whom he would be likely to reveal his intentions, those declarations not being casual and occasional, but repeated from time to time, and evincing a strong determination to carry into effect the objects which he states." And Mr. Jacobs, in speaking of the weight to be given to the oral declarations of a party, says: "The time, occasion and manner of making them, their reasonableness and consistency with themselves and with the other proven facts in the case, the presence or absence of the suspicion of sinister purpose in making them, the character and temper of the person, as well as (if they are oral) the length of time which has elapsed between the time of their alleged utterance and the time when they are testified to, etc., enter materially into the estimation of their value. If they are not inconsistent with the acts, and are faithfully reported, they often serve to turn the scale; but it is otherwise, if they are contradicted by the acts and general conduct of the person making them. The peevish outburst of a person of irascible temper, or the careless expression of one whose habits are unstable and whose purposes are vacillating, are entitled to less weight than the deliberate utterances of a person of known firmness of character. So, too, expressions in conversations are of less value than repeated declarations made to proper persons or declarations in the usual course of business. Mere declarations that a person prefers a residence in one country to another, it has been said, will not be regarded by a court, except in a nicely balanced case." Jacobs, *Domicile*, § 455.

Within the rules thus laid down, the declarations and statements made by Mrs. Reed to the witnesses for the proponents are manifestly entitled to more weight than those made to the witnesses for contestants. Mrs. Reed's relation to them was such as made them proper persons in whom to confide and with whom to converse frankly with regard to her affairs, and to whom she would be likely to reveal her intentions. Mr. Dolph was her legal adviser and friend of long standing, a man to whom she would naturally disclose her real purpose and intent and especially so when it was necessary for him to be informed in regard to that matter in order to advise her intelligently and safely in her business affairs. Mrs. Winch was to her as a daughter with whom she talked freely and frankly. Mr. Winch was her nephew and business agent and would certainly have known of any intent on her part or that of her husband to change their domicile from Portland to California, and yet he testified that he never knew or heard of any contemplated change. Mr. Patterson was a friend, and Miss Stevens was her maid. These witnesses were all in positions to know more of Mrs. Reed's intent and purpose than other witnesses in the case. They are all disinterested, without any object to gain or purpose to advance by exaggeration or distorting the truth. Indeed, Mr. Winch, who is a nephew of Mrs. Reed and one of the legatees in the will, would find his interest largely increased if the contestants could succeed.

The time, occasion and manner of making the declarations to these witnesses, the fact that such declarations were frequently repeated and always consistent with each other and with the solemn declarations made by her in her several wills and written instruments, strongly corroborate the inference as to residence to be drawn from Mrs. Reed's acts and conduct. They were not expressions let drop in mere casual conversations or contained in friendly letters, but, as said by CHASE, J., in *Cruger v. Phelps* (Sup.) 47 N. Y. Supp. 61: "Were made when there was no controversy, and cover such a long period of time as to preclude the idea of their being made with reference to property rights, and they were so deliberately and

frequently made as to preclude the idea of carelessness or inadvertence." They are circumstances which, with the deliberate acts of Mrs. Reed, indicate clearly that her intention was to retain her domicile in Portland and to dispose of her property according to the laws of this state, and the showing made by the contestants is not such as to require a court to defeat her expressed desires as to the devolution of her property by holding that her domicile was not where she supposed and intended it to be.

The decree is affirmed.

AFFIRMED.

Argued 18 October, decided 4 December, 1906.

NOBLE v. WATKINS.

87 Pac. 771.

MORTGAGES—EFFECT OF DEED OF MORTGAGED LAND BY MORTGAGEE.

Where, as in Oregon, a mortgage on real estate creates only a lien thereon, a deed of the encumbered property by the mortgagee to a stranger does not operate as an assignment of the mortgage as against third persons, unless such deed shows that such an effect was intended.

From Columbia: THOMAS A. MCBRIDE, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This suit was commenced on January 26, 1904, by H. E. Noble to foreclose a mortgage given by defendant Watkins and wife to one D. D. Tennyson on certain real property in Columbia County to secure the payment of a promissory note for \$800 in favor of Tennyson, dated December 23, 1896, due one year after date, which note and mortgage, it is alleged, were assigned and transferred to the plaintiff by Tennyson on August 1, 1903. After the issues had been made up, but before trial, Florence E. Godfrey, claiming to be an interested party, filed a bill of intervention, by leave of the court, in which she alleged that on January 14, 1904, and before the commencement of the suit, Tennyson, for a valuable consideration, made, executed and delivered to her

"A certain instrument in writing as his certain deed of conveyance and transfer of that certain note and mortgage mentioned in the original complaint herein, together with the debt evidenced and secured by the same, and your orator for a valuable consideration, in good faith, accepted said deed as such

transfer and conveyance of said note, debt and mortgage from said Tennyson, and shortly thereafter, and on the 18th day of January, 1904, duly and properly placed the same on record in said Columbia County, Oregon; that it was the intention of said Tennyson and your orator, at the date of the execution of said deed, to give and receive a formal and legal assignment and conveyance of said note, debt and mortgage, but by mistake and inadvertence the said deed was made and executed and accepted by your orator in good faith, and without notice, or knowledge on her part of any former transfer to or claim by said H. E. Noble, if any in fact there be."

It is then alleged that immediately after the execution and recording of the deed from Tennyson to Mrs. Godfrey she entered into possession of the mortgaged premises with the consent and acquiescence of Watkins, and has ever since remained in the possession thereof; that the alleged assignment and transfer of the note and mortgage from Tennyson to Noble, mentioned in the complaint, was not recorded, and is, therefore, inferior and subject to her claim; that she is now the owner and holder of said note and mortgage, and entitled to foreclose the same. The prayer is that she be substituted as plaintiff in the suit brought by Noble, and for a decree in her favor. A demurrer was sustained to the bill of intervention and a decree entered in favor of plaintiff, from which Mrs. Godfrey appeals.

AFFIRMED.

For appellant there was a brief with oral arguments by *Mr. William Mosby LaForce* and *Mr. James Buchanan Godfrey*.

For respondent there was a brief and an oral argument by *Mr. Richard Ward Montague*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

Several objections are made to the regularity and validity of the decree appealed from, such as that the complaint does not state facts sufficient to constitute a cause of suit, the decree is not supported by the evidence, and the like; but none of them are such as Mrs. Godfrey can raise unless her bill of intervention shows that she has an interest in the litigation which entitles her to be made a party thereto.

It is not entirely clear from some of the allegations of her bill

what she bases her claim to intervene in the pending litigation upon. But, taking all the averments in connection with the admissions of her counsel in their brief, it is founded upon a deed of conveyance from Tennyson of the mortgaged premises. Such a deed did not operate as an assignment of the note and mortgage given by Watkins and wife to Tennyson, nor did it convey any interest in the mortgaged property. In jurisdictions where mortgages convey the legal title, it has been held that a deed of absolute conveyance by the mortgagee of the mortgaged premises will operate as an equitable assignment of the note and mortgage, when at the time of its execution the mortgagee was in possession: 20 Am. & Eng. Enc. Law (2 ed.), 1029; *Welch v. Phillips*, 54 Ala. 309 (25 Am. Rep. 679). But where, as in this state, a mortgage on real estate does not convey an interest in the land, but constitutes only a lien or encumbrance thereon (*Anderson v. Baxter*, 4 Or. 105; *Sellwood v. Gray*, 11 Or. 534, 5 Pac. 196; *Marx v. La Rocque*, 27 Or. 45, 39 Pac. 401; *Security Trust Co. v. Loewenberg*, 38 Or. 159, 62 Pac. 647), it is clear that an instrument executed by the mortgagee which purports to convey to a stranger the mortgaged property cannot operate as an assignment of the mortgage as against third persons, unless the language of the conveyance is such as to manifest an intention to that end: *Swan v. Yapple*, 35 Iowa, 248; *Johnson v. Lewis*, 13 Minn. 364 (Gil. 337). Mrs. Godfrey, therefore, had no interest in the mortgage or in the mortgaged property that would entitle her to intervene in the pending litigation.

The averment in the bill that she is the owner and holder of the note and mortgage is manifestly the conclusion of the pleader from the facts stated and cannot be regarded as an averment of a fact.

Decree affirmed.

AFFIRMED.

Decided 4 December, 1906.

SETTERLUN v. KEENE.

87 Pac. 763.

CONSTITUTIONALITY OF STATUTE PRESCRIBING QUALIFICATION OF VOTER
AT SCHOOL DISTRICT ELECTIONS.

1. Section 3386, B. & C. Comp., providing that any citizen who has property in a school district on which he or she is liable to pay a tax

shall be entitled to vote at any school district election, is not invalid as prescribing a property qualification in contravention of Const. Or. Art. II, § 2, defining the qualifications of voters, it not applying to school district elections.

SAME—COMPLIANCE WITH STATUTES.

2. Under B. & C. Comp. § 3386, providing that any citizen who has property in the district "as shown by the last county assessment * * on which he or she is liable * * to pay a tax" shall be entitled to vote at any school district election, the voter must have property, the ownership of which must appear from the assessment alone.

From Marion: GEORGE H. BURNETT, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action brought by G. A. Setterlun against H. A. Keene and J. E. Towle, two of the directors of a school district, to recover damages for having been denied the right to vote at a school meeting. Upon the trial he was nonsuited because it did not appear that he had property in the district as shown by the last county assessment upon which he was liable to pay a tax, and was, therefore, not a qualified voter, and, he appeals. The case was submitted on briefs under the proviso of Rule 16, 35 Or. 587, 600.

AFFIRMED.

For appellant there was a brief over the names of *W. H. and Webster Holmes*.

For respondents there was a brief over the name of *Carson & Cannon*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. The statute prescribing the qualification of voters at school meetings, declares:

"Any citizen of this state, male or female, who is twenty-one years of age, and has resided in the district thirty days immediately preceding the meeting or election and has property in the district as shown by the last county assessment, and not assessed by the sheriff, on which he or she is liable or subject to pay a tax, shall be entitled to vote at any school meeting or election in said district." B. & C. Comp. § 3386.

It is claimed that this statute is invalid so far as it prescribes a property qualification because in contravention of Section 2 of Article II. of the Constitution, defining the qualifications of voters. But it was held in *Harris v. Burr* 32 Or. 348 (52 Pac.

17, 39 L. R. A. 768) that the constitutional provision invoked does not apply to school elections, and that the legislature has plenary power to define the qualification of voters at such elections. See, also, *Livesley v. Litchfield*, 47 Or. 248 (83 Pac. 142). These decisions are decisive of the question now presented.

2. The contention that the statute is satisfied if the person offering to vote in fact owns property which is listed on the assessment roll, although it may have been assessed in the name of another, is without merit. The requirement is that he must have property "as shown by the last county assessment." The ownership of the property must appear from the assessment and cannot be shown by extrinsic evidence.

The judgment is affirmed.

AFFIRMED.

Decided 4 December, 1906.

AMORT v. SCHOOL DISTRICT.

87 Pac. 761.

SCHOOL DISTRICTS—SPECIAL MEETINGS—PROOF OF POSTING NOTICES.

1. Under Section 3380, B. & C. Comp., relative to notices of school meetings, and Section 3395, relative to the duties of clerks of school districts, it is part of the official duty of a school clerk to post notices for special meetings, and his official record is sufficient evidence of what he did.

SCHOOL MEETINGS—AFFIDAVIT OF POSTING NOTICES.

2. Sections 538 and 539, B. & C. Comp., requiring proof of the service of a summons to be by affidavit, do not apply to the proof of posting notices of school meetings.

SCHOOL DISTRICTS—ADVERTISING FOR SUBSCRIPTIONS FOR INDEBTEDNESS.

3. The board of directors of a school district may advertise for subscriptions for the indebtedness of the district in such amounts as it may deem advisable.

SCHOOLS—RECORD EVIDENCE OF AMOUNT OF INDEBTEDNESS.

4. It is not necessary to the validity of an obligation of a school district that it appear by the records of the clerk that the indebtedness does not exceed the legal limit, that matter being determinable from the assessment.

From Marion: WILLIAM GALLOWAY, Judge.

Writ of review by John Amort against School District No. 80 and others to review the validity of the proceedings of the school district in determining to erect a school building and incurring an indebtedness therefor. From a decree in favor of plaintiff, defendants appeal.

REVERSED.

For appellants there was a brief with oral arguments by *Mr. John A. Carson* and *Mr. Anderson M. Cannon*.

For respondents there was a brief over the name of *W. H. and Webster Holmes*, with an oral argument by *Mr. William Henry Holmes*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a writ of review, challenging the validity of the proceedings of the defendant school district in the matter of the erection of a school building and the incurring of an indebtedness therefor. On February 20 1906, there was presented to the board of directors a petition signed by a number of the legal voters asking the board to call a special meeting of the electors for the following purposes: First, to erect, complete and fit for occupancy a new school building upon the site of the present schoolhouse of district No. 80, at a cost of not less than \$1,400, nor to exceed \$1,700; second, to determine ways and means most desirable for securing the funds for this purpose. On February 22d, the prayer of the petitioners was granted, and the clerk was instructed by the board to post notices calling a meeting of the electors and stating the purpose thereof for Monday, March 5th, at 1:30 o'clock p. m., and the record recites:

"Pursuant to the foregoing order of the board of directors, the clerk of the district prepared and posted in three public places within the boundaries of said district more than ten days prior to the date of said meeting on March 5 1906, a notice of said special school meeting, which was read at the said meeting of March 5, 1906, by the clerk and which was and is in words and figures as follows, to wit."

A meeting of the electors was held at the time and place specified in the notice and it was voted to erect a new school building as proposed therein and to issue warrants therefor at the best rate of interest obtainable, not to exceed 7 per cent per annum, such warrants to be paid from the tax levy of 1906. On April 10, 1906, the clerk was authorized and instructed by the board to post notices as provided by law, inviting subscriptions from the bona fide residents of the district to the amount of \$800 for the purpose of proceeding with the erection of the schoolhouse. On

June 6, 1906, at a meeting of the board of directors, all the members being present, the clerk was ordered and instructed to forthwith enter of record the notice of the meeting held March 5, 1906, which was accordingly done, and the record, as signed by the chairman of the board and the clerk, after setting out the notice in full, proceeds:

"The notice above referred to was posted in three public places as follows: One notice was posted on the schoolhouse front door, and one at the door of the postoffice building, Shaw, Or., and one at the junction of the county roads of the B. C. McCrory farm, all being in the School District No. 80, and said notices were posted in public places so as to be seen and read by the traveling public, and the said notices were posted more than ten days prior to the 5th day of March, 1906. A copy of said notice was read at said meeting March 5, 1906."

Thereafter this proceeding was instituted to vacate and annul the proceedings of the school meeting and the subsequent action of the board in reference thereto, on the ground principally that there was no legal proof of the posting of the notices calling such special meeting, because the record does not disclose that it was made by the affidavit of the clerk.

1. The statute provides that the board of directors of a school district shall cause the clerk to post written notices of all regular and special meetings "in three public places in the district at least ten days before the day appointed for said meeting." B. & C. Comp. § 3380. There is no statute requiring the proof of such posting to be made in any particular manner, and, in our opinion, it is sufficient if it appears from the records of the district and board meetings kept by the clerk that the notice was, in fact, posted as required by law. It was the duty of the clerk to give the notice and to keep such record: B. & C. Comp. § 3395. The posting of the notices by him is, therefore, in pursuance of his official duty, and an entry by him in the record of the time and places where posted is equivalent to his certificate and sufficient proof of such posting.

2. Sections 538, 539, B. & C. Comp., have no application to a case of this kind. They are a part of the Code of Civil Procedure, and have reference to the service of notices and other

papers upon a party or his attorney in actions, suits or proceedings.

3. The board was not required to advertise at one time for subscriptions for the entire amount of the indebtedness it was authorized to incur for the erection of the school building.

4. Nor was it fatal to the proceedings that the records of the school meeting do not show that the indebtedness authorized to be incurred in the building of the schoolhouse does not exceed 5 per cent of the taxable property of the district. That was a matter to be determined from the assessment and not the minutes of the school meeting.

The decree of the court below will be reversed, and the writ of review quashed.

REVERSED.

Decided 4 December, 1906.

BROWNELL v. SALEM FLOURING MILLS CO.

87 Pac. 770.

APPEAL—DEFAULT—MOTION NOT AN ANSWER.

1. A motion to strike out parts of a complaint is not an "answer" within the meaning of Section 548, B. & C. Comp., providing for appeals, and a judgment entered upon the refusal of defendant to plead after his motion has been denied is not appealable, though a demurrer is an "answer," the difference being that the latter raises an issue of law while the former does not raise any issue.

PLEADING—CORRECTING ERROR IN OVERRULING MOTION TO STRIKE OUT.

2. If a motion to strike out part of a pleading be overruled, the same question can be raised by objecting to the evidence offered in support of the allegations moved against, and by asking the court to strike it out of the record or instruct the jury to disregard it.

Appeal from Marion County.

Action by S. S. Brownell against the Salem Flouring Mills Company. From a judgment for plaintiff, defendant appeals. Respondent now moves to dismiss the appeal.

DISMISSED.

Mr. Woodson Taylor Slater for the motion.

Mr. George Greenwood Bingham, contra.

MR. JUSTICE MOORE delivered the opinion of the court.

1. This is a motion to dismiss an appeal on the ground that the judgment sought to be reviewed was given for want of an answer. A motion to strike out parts of the complaint was

denied, and, the defendant declining further to plead, judgment was rendered against it for the sum demanded, from which an appeal was attempted to be taken. The statute, prescribing an appealable decision of a court, contains the following provision:

"Any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer; may appeal therefrom:" B. & C. Comp. § 548.

Any pleading on the part of the defendant that interposes an issue of fact or of law is, in a general sense, denominated an "answer," and, under this very liberal definition, the formal mode of disputing the sufficiency of the plaintiff's primary pleading comes within the meaning of this term: Boone, Code Pl. § 58. Thus, when a demurrer to a complaint is overruled, and, the defendant refusing further to plead, a judgment or a decree is rendered against him, he may appeal therefrom on the ground that the issue of law thus tendered constitutes an answer: *Kearns v. Follansby*, 15 Or. 596 (16 Pac. 478); *Hendy Machine Works v. Portland Sav. Bank*, 24 Or. 60 (32 Pac. 1036); *Willis v. Marks*, 29 Or. 493 (45 Pac. 293). An application for an order is a motion: B. & C. Comp. § 534. Its purpose, when a defect in a pleading exists, is particularly to point out some alleged irrelevant or redundant matter therein which may be stricken out: B. & C. Comp. § 86. "There can be no doubt," says Mr. Chief Justice LORD, in *The Victorian*, 24 Or. 121 (32 Pac. 1040, 41 Am. St. Rep. 838), "that the object of a motion to strike out is not to perform the office of a demurrer." The sufficiency of a pleading, as to matters of substance, must be tried on a demurrer, but, when the manner of stating the facts is defective for non-compliance with the rules of pleading, the remedy for its correction is by motion: 14 Enc. Pl. & Pr. 91. A motion calling attention to a defective statement in a pleading does not present an issue of fact or of law, and hence cannot, under the most liberal rule, be classed as an "answer."

2. It must be admitted, as was argued by defendant's counsel, that, if a motion to strike out irrelevant or redundant matter from a complaint be denied and such matter is controverted in the answer, the issue thus made is immaterial. An error com-

mitted in overruling a motion to strike out can be corrected, however, by objecting and excepting to the admission of evidence tending to establish such issue, and also requesting an instruction not to consider such evidence, which, if denied, the action of the court in this respect will be reviewed on appeal: *Krewson v. Purdom*, 11 Or. 266 (3 Pac. 822); *Thomas v. Herrall*, 18 Or. 546 (23 Pac. 497).

It follows from these considerations that the appeal must be dismissed, and it is so ordered.

APPEAL DISMISSED.

Decided 4 December, 1906.

NODINE *v.* RICHMOND.

87 Pac. 775.

ACCOUNTING BY TRUSTEES—EFFECT OF EVIDENCE.

1. The evidence affirmatively shows that the trustees fully accounted to Fred Nodine in writing for the property transferred to them, and that they did not have in their hands sufficient funds arising from the trust property to have prevented the sales of the real property of Nodine under the executions on which it was sold.

ACCOUNTING—EVIDENCE OF FRAUD BY TRUSTEES.

2. The evidence entirely fails to show any fraud or conspiracy between the trustees and the creditors of Fred Nodine, or any of them, to injure his interests or advance their own.

INADEQUACY OF PRICE AS EVIDENCE OF FRAUD.

3. Mere inadequacy of price on an execution sale, where the parties stand on an equal footing, and where there are no confidential relations between them, is insufficient to set aside the sale, unless the inadequacy is so gross as to amount to proof of fraud or to shock the conscience.

EXECUTION SALE—EVIDENCE OF INADEQUACY OF PRICE.

4. A review of the evidence as to the value of the Nodine land transferred by him to trustees and afterward sold on execution under prior liens, does not show that the sales were made for an inadequate price.

EXECUTION SALE—EVIDENCE OF CHILLED BIDDING.

5. The fact that, while property was being offered for sale under execution in favor of a bank, an officer of the bank told one who made a bid that the lands were being sold subject to mortgages thereon, whereupon the bidder went away and the officer purchased, does not show the preventing of competitive bidding so as to warrant the setting aside of the sale where the representation was true.

SALES—EVIDENCE OF COLLUSION WITH TRUSTEE.

6. The evidence does not show that W. T. Wright colluded with various parties to purchase for his secret benefit part of the Fred Nodine land that had been transferred to him as trustee.

LANDLORD AND TENANT—EXECUTION SALE AGAINST LANDLORD.

7. A tenant is not estopped by his relation to the landlord from purchasing the demised land at an execution sale against the landlord.

EXECUTION SALE—EVIDENCE OF INADEQUACY OF PRICE.

8. Where land sold on execution was sold some time later for very little more than the purchase price, and after a dispute existing at the time of the sale as to riparian claims had been settled in favor of the lands, no such inadequacy is shown as to warrant a setting aside of the sale.

EVIDENCE OF CONSIDERATION FOR DEED.

9. The evidence preponderates to the effect that the quitclaim deeds given by Fred Nodine and wife January 3, 1897, were given for a valuable consideration to convey an inchoate right of dower, and should not be cancelled.

NEED OF SERVING AMENDED PLEADINGS.

10. Under Section 100, B. & C. Comp., providing that amended complaints must be served on adverse parties, a decree based on an amended complaint that was not served cannot be sustained.

COSTS IN EQUITY CASES—DISCRETION.

11. The awarding of costs in equity cases is discretionary under Section 566, B. & C. Comp.

From Union: ROBERT EAKIN, Judge.

Statement by MR. JUSTICE HAILEY.

This suit is brought by Fred and Eliza Nodine for an accounting by the defendants F. L. Richmond and W. T. Wright as trustees of certain personal property transferred and certain lands conveyed to them by the plaintiffs under a contract, hereinafter set out, between the plaintiff Fred Nodine and the defendant F. A. E. Starr, and for \$150,000 damages against such trustees for permitting the sale of such lands upon executions issued from judgments and a mortgage existing against the plaintiff Fred Nodine at the time he conveyed the lands to said trustees, and to recover such lands or the value thereof from the purchasers at sheriff's sale, and cancel certain deeds thereto.

The facts are substantially as follows:

In April, 1894, the plaintiff Fred Nodine owned about 3,660 acres of land in Union County, Or., known as the "Nodine Farm," and also a large amount of personal property, consisting of about 275 head of range horses, about 400 head of cattle and 250 hogs, and a lot of farm implements and machinery, including a threshing machine, engines, hay balers and other usual farm equipment, such as wagons, harness and horses. He also owned a judgment against one J. Q. Shirley for about \$2,000, upon which execution had issued, and the sheriff of Union

County then held under attachment certain live stock and farm implements. He also had an interest in certain first-mortgage bonds of the Union Railway Co. pledged to him as security by the owner of the bonds. At this time he was indebted to various persons on secured and unsecured claims to the amount of about \$57,500. About \$30,000 of this was secured by mortgages upon his lands, nearly all of which were mortgaged. About \$20,000 of it was in the form of a dozen or more judgments against him, which were liens against all his lands, and the remainder was unsecured notes and accounts and unpaid taxes. Among the judgments against him was one for over \$1,600 and attorney fees and costs in favor of John W. Couper, entered in 1893, and afterwards, in 1894, sold and assigned to the defendant J. P. Marshall. The First National Bank of Union also held two judgments against him, each entered in 1893, one for \$2,400 and attorney fees and costs, and the other for \$6,739 and costs, all of which judgments will be referred to hereafter. Times were hard, money scarce and difficult to secure. Values were low and farm products and live stock did not find a ready market at any price. In fact, conditions were such that a financial panic prevailed over the entire country, and many men of property were forced to sacrifice all to meet their creditors. Under these conditions, with a large amount of his indebtedness then due and pressing for payment, and his property in danger of being sacrificed by actions and suits, and wasted and consumed in expenses and litigation without paying his indebtedness, he entered into negotiations with the defendant Starr to devise some means whereby he might pay his debts and have something left from his property, if possible. Before entering into the contract hereinafter set out, it was first suggested that one trustee be appointed and bonds required of him for the faithful performance of his duties, but it was later arranged that, in lieu of such bond, the defendant Wright, a friend and fellow townsman of Nodine, in whom he had confidence and whom he selected, should be made co-trustee with defendant Richmond, who had been selected by Starr. The following agreement was then signed by the parties:

"This Agreement made and entered into this 11 day of April,

A. D. 1894, by and between Frederick Nodine, of Union, Union County, Oregon, and F. A. E. Starr of Portland, Oregon, Witnesseth:

That Whereas the said Frederick Nodine is the owner of certain real estate in Union County, Oregon, particularly described as follows, to wit: Section 32, the South one half and North West Quarter of Section 33, the South half of the South West Quarter and East half of Section 29, all in Township Three South of Range 39 East W. M. and the West half of the West half of Section 2, the East half and the North West Quarter and the North half of the South West Quarter of Section 3, Section 4, the North half and about 20 acres included within the meander line of the Tule Lake in the North East corner of the South East Quarter of Section 5, the North half of the North half of Section 9 all in Township 4 South of Range 39 East W. M. and the South West Quarter and South West Quarter of South East Quarter of Section 6 and North half of North East Quarter of Section 7 all in Township 4 South of Range 40 East W. M. all of said lands being situated in Union County, Oregon, and including the land known as the Tule Lake conveyed by the State of Oregon to said Frederick Nodine;

And Whereas the said Frederick Nodine is largely indebted to numerous persons for large sums of money due and to become due, a list of his creditors and the amount owing to each being hereto attached marked 'Exhibit A' and made part of this agreement;

And Whereas the said Frederick Nodine is desirous of making some arrangement for the purpose of disposing of said lands for the purpose of paying said claims and demands:

Now, Therefore, the said Frederick Nodine for a valuable consideration, upon the signing of these presents, hereby agrees to convey by deed of general warranty all his right, title and interest of, in and to the lands hereinbefore described to F. L. Richmond of Portland, Oregon, and W. T. Wright of Union, Oregon, in trust however upon the terms and conditions following, to wit: To dispose of the said lands so soon as the said Richmond and Wright in their judgment may consider it for the best interest of the said Nodine for a price not less than \$27.50 per acre, the terms of the sale to be such as to secure the purchase price of the said lands in a manner satisfactory to the said Nodine. Out of the proceeds of the sales of the said lands, or the proceeds of any other property, rights or choses in action, which may be assigned or transferred to said trustees under this agreement, the said trustees are to pay the debts of the said Frederick Nodine hereinbefore referred to and mentioned in the

said Exhibit A, hereto attached, and also all taxes against the said lands and all interest and costs that may accrue upon or by reason of the said indebtedness. The remainder of the proceeds of the sales of the said real property, and of any and all other property, rights or choses in action assigned or transferred to the said trustees under this agreement, and the remainder of the said property remaining in the hands of the said trustees unsold, shall, upon the completion of the payment of the said indebtedness and the performance of the conditions herein set forth, be divided between the said Frederick Nodine and the said F. A. E. Starr, the said Nodine to receive four fifths ($\frac{4}{5}$) of such remainder and the said F. A. E. Starr one fifth ($\frac{1}{5}$) of the said remainder.

Now, Therefore, in consideration of the premises aforesaid, the said F. A. E. Starr, hereby undertakes and agrees to conduct all the legal business necessary, made necessary or that may become necessary by reason of this agreement, and to use every effort and endeavor on his part necessary or proper for the disposal of the said property and the payment of the said indebtedness.

It is Hereby Further Agreed and understood, that all moneys arising from the sales of the said lands, and from the sales and disposal of all other property rights or choses in action, by the said trustees under this agreement, shall be deposited in the First National Bank of Union, Oregon, in the joint name of the said trustees, and that the same shall not be drawn or paid out except upon their joint order, and that no sales of the said lands, or of any other property, rights or choses in action, assigned or transferred under this agreement, shall be made by them.

It is Further Agreed that all the costs, disbursements and expenses necessary for the carrying out of this agreement shall be borne by the said F. A. E. Starr out of the one-fifth ($\frac{1}{5}$) interest which he shall receive by reason of this agreement.

In Witness Whereof the said parties have hereunto set their hands and seals the day and year first above written."

Exhibit A, referred to in the foregoing agreement, contains a list of the amounts and character of his indebtedness, aggregating about \$45,000, and enumerated among others the three judgments hereinbefore mentioned. He was, however, indebted about \$12,500 additional on two mortgages, one judgment, unpaid taxes and interest, not mentioned in the exhibit. On April 12, 1894, pursuant to this agreement, the plaintiff and his wife

deeded to the defendants Richmond and Wright, by deed absolute upon its face, but in fact a trust deed, all of the lands then owned by plaintiff, consisting of about 3,660 acres of farm and grazing lands, and thereafter delivered to them all his personal property, except the 275 head of range horses and 30 head of range cattle, and the trustees assumed charge of the lands and personalty, and conducted the farming operations upon the lands with plaintiff's knowledge, consent and partial assistance until the fall of 1895, the management thereof being largely in the hands of defendant Richmond, but with knowledge on the part of Nodine of all that was done, and sufficient knowledge on the part of Wright to make him equally liable therefor with Richmond. The range horses and cattle last mentioned never came into the possession of the trustees, but were retained and sold by Nodine personally, with the consent of the trustees, and are not involved in this suit. The personal property held under the execution issued upon the judgment against Shirley was sold, and a portion thereof, consisting of a few cows and horses and farm implements, was bought in for \$1,730.75 by Richmond and Wright as trustees for the plaintiff, as shown by the sheriff's return upon the execution, which is in evidence. A part of the remainder was sold to other persons and the proceeds applied on the costs of sale, including keepers' fees, and the rest of the property was released by order of the plaintiff and his attorneys to Shirley and other persons claiming it. The property so purchased was taken to the Nodine Farm and there used and disposed of with other property transferred to the trustees.

The interest of plaintiff in the first-mortgage bonds of the Union Railway Co. was \$6,756.31, and was realized from the sale thereof by the trustees and charged in the account hereafter referred to. The cattle and hogs turned over to the trustees by plaintiff were sold by them with his knowledge and consent, and fully accounted for to him. The other personal property, consisting of work horses, farm implements and machinery, and that purchased at the Shirley sale, and the crops raised upon the lands, and the proceeds of such portions of the property and

crops as were sold, were used by the trustees in farming the land and in payment of pressing claims against Nodine, and what remained thereof in December, 1895, was sold to the defendant Townley as hereinafter stated.

When the trust deeds were executed, Starr and the trustees began negotiations for the sale of the lands, and had a large portion of them surveyed into small tracts, and advertised them in various ways and placed them for sale with real estate men in Union County, in Portland, and in the East, but were unable, on account of the hard times and stringent condition of the money market, to effect any sales, except for 40 acres to one D. M. Jameson for \$1,400, which he paid the trustees, but \$650 of this sum was paid by them to Balfour, Guthrie & Co. for the release of the mortgage held by them upon the lands sold. The trustees also bargained about 90 acres to one August Nelson, who made two payments thereon, amounting to about \$702, but before paying any more the land was sold under execution issued upon the Couper judgment hereinbefore mentioned, and the trustees received nothing more therefrom. All the proceeds from these sales were fully accounted for by the trustees to plaintiff. In December, 1894, upon the written request of the plaintiff Fred Nodine, the trustees rendered him a written statement of their receipts and disbursements as trustees to that date, which shows that the farming operations for that year had not been very successful. However, they continued to farm the lands and tried to effect a sale thereof during the year 1895, but crop shortages, caused by the high water in the spring and drought in the summer, made the farming operations net small returns each year.

In the latter part of December, 1895, the trustees submitted to the plaintiff a full report of all their doings to that date, showing what they had received and how it had been expended, and that they had paid out of the proceeds from the sales of personal property, crops raised, and lands sold and bargained and from moneys advanced by Starr and Richmond about \$20,000 on the plaintiff's old indebtedness. Starr and Richmond each advanced a considerable sum of money for the payment of claims pressing against the plaintiff Nodine, and Starr also bor-

rowed for that purpose \$1,000 from the Ainsworth National Bank of Portland, and according to the statement of the trustees prepared by the defendant Richmond in December, 1895, there was, on account of such advances, then due Starr \$3,885.06, Richmond \$1,300.48, and the Ainsworth National Bank \$525. This account was accompanied by vouchers for all disbursements, and the account and vouchers were all gone over and examined item by item, as the witness Starr says, by the plaintiff Nodine with the defendant Wright, and also with Starr, and fully explained to and accepted by plaintiff. Nodine also admits receiving the statement, but denies that any vouchers were furnished him, and says that he only had their word for the expenditures.

During the month of December, and about the time the account was rendered, the remaining personal property, consisting of work horses and farm implements and machinery, was sold to Townley, and the lands rented to him for a period of one year, for a lump sum of \$6,000, for which he gave his note to Richmond as trustee. The testimony shows that this was done with the knowledge and consent of Nodine, who was consulted about the value of the property and the rental of the land, and about \$4,000 of this note was for personal property and the rest rental of the land. The statement furnished by Richmond to Nodine in December, 1895, accounted for the disposition of all personal property received by the trustees and all lands sold by them, and all other transactions up to that time, except the sale and leasing of the land to Townley above mentioned, and this, being in the form of a note, as explained by the witness Richmond and known to the plaintiff at the time, was not included in the statement which it seems had been prepared just prior to the consummation of the transaction with Townley. The note for \$6,000 given by Townley to Richmond as trustee was afterwards turned over by Richmond to the Ainsworth National Bank, presumably to secure the balance due it of \$525 for money advanced, and the balance due Starr and Richmond for their advances; it appearing that Starr had borrowed from the bank the money which he advanced.

Starr and the trustees being unable to dispose of the lands, and there being no further funds or personal property, early in 1896 the judgment and mortgage creditors began pressing for payment of their claims. The defendant J. P. Marshall in January, 1896, caused an execution to be issued upon the judgment purchased by him from Couper in 1894, and had the sheriff levy upon lands upon which he had a mortgage for \$4,000, subsequent in time to his judgment, and upon which Balfour, Guthrie & Co. held two mortgages for \$4,000, each prior in time to his judgment, and had him also levy upon a quarter section of other mortgaged land and 280 acres of land not mortgaged, all of which lands were sold at sheriff's sale in April, 1896, under said execution, and bought by Marshall for the Ainsworth National Bank, of which he was cashier, for the amount of the judgment held by him, which sale was afterwards confirmed and a sheriff's deed executed therefor in November, 1896, after the time for redemption had expired. These lands were held by the bank until 1897, and, after paying off all prior liens, they sold them to other persons who are not parties to this suit for \$19,800, taking their notes for the greater portion of the purchase price, the sum paid being about the amount of the mortgages and other claims against the land at the time it was purchased by the bank.

Shortly after the execution had been issued upon the Couper judgment by Marshall the plaintiff Nodine requested the defendant Wright, who was and had been for several years president of the First National Bank of Union, to have an execution issued upon the judgment held by the bank against the plaintiff for over \$6,000, which was subsequent to the Couper judgment, stating to him at the time that it looked as if plaintiff's lands would have to go, as his creditors were pressing, and he wanted the bank to try to make itself whole on what was due it. Acting upon this request, Wright had an execution levied upon all of the plaintiff's lands not covered by the execution in the Couper case, and the lands were offered at sheriff's sale and sold in May, 1896, and bought by the defendant Townley for \$110, subject to the mortgages and all other liens thereon—there being a mort-

gage for \$5,000 in favor of S. D. Townley, brother of defendant Townley, upon a portion of the lands, and another mortgage for \$5,000 in favor of the Western Hawaiian Investment Co. upon another portion of the lands, and a mortgage for \$3,600 in favor of J. F. F. Brewster, and one for over \$690 held by the Farmers' & Traders' Bank of La Grande, Oregon, upon another portion of the lands, and other claims thereon, and, in addition thereto, there was a question as to the title to portions of the lands embraced in what was known as the "meander lines" of Tule Lake, these being lands purchased from the state as swamp lands, to which patent had not then issued from the United States. This sale was also confirmed by the court, and, no redemption having been made, a sheriff's deed was executed therefor to defendant W. J. Townley.

On January 15, 1896, the Farmers' & Traders' Bank of La Grande began foreclosure proceedings upon its mortgage covering the lands in the Brewster mortgage, and also claimed that the lands embraced in its mortgage included a part of the lands in the Western Hawaiian Investment Company's mortgage within the meander lines of Tule Lake, and made the last-named company party defendant to the suit. On August 27, 1896, J. F. F. Brewster began foreclosure proceedings upon his mortgage, covering the same lands in the mortgage of the Farmers' & Traders' Bank, and the two suits were consolidated, and upon demurrer on the part of the Western Hawaiian Investment Co. they were dismissed as to the claim of the Tule Lake lands and as against the investment company November 14, 1896, and a decree foreclosing both mortgages entered February 6, 1897. The lands were thereafter sold at sheriff's sale and bought by Brewster, and no redemption made, and were then sold by him for \$3,800, about the amount of his mortgage claim. In February, 1898, the Western Hawaiian Investment Co. obtained a decree foreclosing its mortgage for \$5,000 above mentioned in which suit most of the defendants herein were defendants, and at an execution sale under such decree it purchased all of the lands covered by its mortgages, except about 84 acres, which were purchased by the defendant W. J. Townley. This sale was con-

firmed by the court and no redemption made. The lands purchased by the investment company aggregated over 1,000 acres included within the lands purchased by defendant Townley under the sale made upon the execution issued in the case of the First National Bank of Union against Nodine. An appeal was taken from the decree of foreclosure in the Western Hawaiian Investment Company case by the Farmers' & Traders' Bank of La Grande, a defendant therein, upon a question of the title to some of the lands involved therein, lying within the meander lines of Tule Lake. After the determination of this appeal, July 10, 1899 (*Western Investment Co. v. Farmers' Nat. Bank*, 35 Or. 298, 57 Pac. 912), the First National Bank of Union, whose judgments against Nodine were still unpaid, purchased from the Western Hawaiian Investment Co., for \$8,500, its certificate of sale issued by the sheriff, and had such certificate assigned to the defendant Townley, who was vice-president of the bank, as trustee for it, he being in possession of the lands as tenant of the investment company. Later, in April, 1901, after the title to the lands involved had been determined by the Interior Department and a patent issued therefor by the United States to the state, Townley bought the interest of the bank therein and had the sheriff deed the lands to him May 1, 1901, paying the bank therefor \$16,500, being the balance due upon its judgments, with interest, and the amount paid by it to the investment company for the certificate.

The mortgage held by J. F. F. Brewster upon the lands purchased by Townley under the First National Bank of Union execution did not include the lands under the Western Hawaiian Investment Co. mortgage or the S. D. Townley mortgage. At the time of the commencement of this present suit the only portion of the lands purchased by Townley at the execution sale in the case of the Bank of Union against Nodine not foreclosed on or sold under prior liens was about 800 acres covered by the \$5,000 mortgage given to S. D. Townley, in sections 4, 5 and 9, township 4, south of range 39 E., and some fractional lots, all of which, except the lots, are included in the patent to the state above mentioned. His rights under that purchase to lands mort-

gaged to the Western Hawaiian Investment Co. had been barred by the foreclosure of its mortgage, and he had subsequently acquired title thereto by purchase from the bank of the sheriff's certificate issued to the investment company, and his rights to the lands covered by the Brewster mortgage had been barred by foreclosure of that mortgage and sale of the lands to Brewster without redemption, so that, at the beginning of this suit, he held title to a portion of the lands formerly owned by plaintiff by purchase at the sale under the execution in the case of the bank against Nodine, and to another portion by purchase of 84 acres directly, and the rest by assignment of the sheriff's certificate issued upon the sale under the execution in foreclosure of the investment company's mortgage.

After sales of these lands to Marshall and Townley in the spring of 1896, the plaintiffs on July 13, 1896, instituted a suit against all of the defendants herein and D. M. Jameson and August Nelson, and one James Raymond, to have the contract of plaintiff with the defendant Starr and the deeds and transfers made thereunder to the defendants Richmond and Wright as trustees declared a deed of assignment for the benefit of all his creditors, and for an accounting on the part of said trustees for all property that came into their hands, and for damages against them for mismanagement of the property in various ways, and to set aside the sales made to defendants Marshall and Townley. An amended complaint was thereafter filed in that suit, and upon motion of the defendants the greater portion thereof was stricken out, leaving practically as the only important question for determination by the court therein whether or not the contract with Starr and the deeds to the trustees made thereunder constituted an assignment for the benefit of the creditors of the plaintiff Nodine. Answers were filed by the various defendants and the case put at issue and testimony taken, and the case dragged is weary length along with various substitutions and changes of attorneys for the plaintiff, until March, 1903, when, being set for argument upon the testimony taken by a stenographer and reported to the court, upon motion of plaintiff's attorneys made in open court, it was dismissed at

plaintiff's cost. Thereafter the suit was commenced, and the amended complaint upon which it was tried was filed July 18, 1904.

All of the defendants answered, except Richmond, who was not served with summons, and Starr, who, although served with summons and the original complaint, had no notice of the amended complaint upon which the case was tried. The answers denied all the material allegations regarding the failure and refusal of the trustees to account, and negligence on their part in permitting the sale of the lands upon executions, and also all charges of fraud and conspiracy and misconduct on the part of any of the defendants, but admit the execution of the contract with Starr and of the deeds to Richmond and Wright as trustees, alleging the latter to be for the benefit of plaintiffs and their creditors, but the defendant Wright claimed to hold under the deeds as a naked trustee of the title only to be transferred in accordance with the contract with Starr, and denied being trustee of the personal property. The official relations of Marshall and Connell to the Ainsworth National Bank and of Wright and Townley to the First National Bank of Union are admitted as hereinafter stated. Further defenses are plead of mortgages and judgment liens upon the land and sale thereof under executions issued under two of said judgments as heretofore stated, and confirmation of such sales and payment thereafter by the purchasers of certain mortgages and claims against the lands. The former suit dismissed by plaintiff in March, 1903, is also pleaded as a defense.

Upon trial the lower court found in effect that the defendant Wright was a naked trustee of the title only as claimed by him, and not accountable for the management of the lands or for the personal property, but that the defendant Starr was accountable to plaintiffs for \$1,086.60 received by him on account of said trust, and that there was no fraud or collusion in the purchase of any of the lands upon execution sales thereof upon the part of any of the defendants, and that this suit should be dismissed as to the defendants Wright, Townley, and First National Bank of Union, but that defendant Connell, acting for the Ains-

worth National Bank, had fraudulently obtained a quitclaim deed from defendants to the land involved herein and conveyed a part thereof to Marshall, and that defendant Richmond and wife had fraudulently made a deed to Connell and one to Marshall for certain land, and that all such deeds should be set aside and canceled, and entered a decree dismissing the suit as to Wright, Townley, and First National Bank, and canceling the deeds to Connell and from him to Marshall, and from Richmond and wife to Connell and to Marshall, and awarding a decree against Starr for \$1,086.60, and against Starr, Connell, Marshall and Ainsworth Bank for costs, but denying any further relief against such last named defendants. From all that part of the decree, except the judgment against Starr and the cancellation of the deeds, the plaintiffs appeal, while the defendants Connell, Marshall, and Ainsworth Bank appeal from the decree of cancellation and costs against them. MODIFIED.

For appealing plaintiffs there was a brief over the name of *Lomax & Anderson*, with an oral argument by *Mr. Leroy Lomax*.

For respondents and appealing defendants there was a brief over the names of *Crawford & Crawford*, *C. E. Cochran* and *Chamberlain & Thomas*, with oral arguments by *Mr. Thomas Harrison Crawford*, *Mr. Cochran* and *Mr. George Earle Chamberlain*.

MR. JUSTICE HAILEY delivered the opinion of the court.

1. In support of the claim for an accounting, it is alleged that the trustees have failed, neglected and refused to account to plaintiffs for the property transferred to them. To sustain the contention for damages for permitting the sale of the lands upon execution, it is charged that the trustees had in their possession and control sufficient funds arising from the trust property to have paid these claims and prevented the sales of the lands. Neither of these contentions is proved by the evidence. On the contrary, it is shown that Nodine was advised and consulted with regarding the sale and disposition of all property, real and personal, and that all proceeds therefrom were fully

accounted for by the reports made in December, 1894, and again in December, 1895, and the sale and lease to Townley, and that, so far as the rents and profits of the lands were concerned, he consented that the trustees should farm the lands and apply the crops and other proceeds thereof to the payment of the maintenance and running expenses, and the surplus, if any, to his debts, and that he consulted and advised with and assisted them in the farming operations and the management of the property and sales. The evidence shows that, instead of having trust funds on hand unaccounted for which could have been applied to the payment of the judgments upon which executions were issued, the trustees had not only exhausted all personal property in the payment of pressing claims and had done so with Nodine's knowledge, and had fully accounted to him for all receipts and expenditures, which account he had approved and accepted after having gone over it in detail, but had also used all reasonable means to sell the real estate in accordance with the terms of the contract, and failed. It was not until after all these things had been done, when all resources had been exhausted, that the executions were issued upon the judgments, and the evidence shows that at least one of the executions was issued at Nodine's request. The proof is therefore wanting to support the charge of funds sufficient on hand to pay the judgments.

2. To recover the lands or the value thereof and have canceled certain deeds thereto, fraud and conspiracy upon the part of all the defendants are charged in procuring the original contract between Starr and plaintiff Fred Nodine, and in all the subsequent acts of defendants in relation to the plaintiffs and the trust property and its proceeds. It is alleged that defendant Starr was attorney and agent for all of the defendants in procuring the contract with Nodine, and that the defendants Marshall and Connell were cashier and vice-president, respectively, of the defendant Ainsworth National Bank, and that the defendants Wright and Townley were president and director of defendant First National Bank of Union, and that the trustees, conspiring with the other defendants, failed to pay, when they

had sufficient trust funds therefor, certain judgments existing against the plaintiff Fred Nodine which were liens upon all his lands, and one of which was owned by the defendant Marshall and the other by the First National Bank of Union, and caused executions to issue thereon and upon a mortgage foreclosure decree in favor of the Western Hawaiian Investment Co., and had the lands of the plaintiff sold thereunder, and prevented competitive bidding at the sheriff's sale of such lands by falsely representing that they were greatly incumbered by mortgages and other liens, and were being sold subject to such mortgages and liens, and thereby purchased the same at grossly inadequate prices, and that said trustees failed to notify plaintiff of the issuance of such executions and of the sales thereunder. It is further alleged that the defendant Connell, acting with the other defendants, by false and fraudulent representations, procured from the plaintiffs a quitclaim deed to all the lands so sold at sheriff's sale, and also by the same means procured an assignment of the plaintiff's interest in a certain suit then pending in the Circuit Court of the State of Oregon for Union County, brought by plaintiffs against all the defendants herein, except Connell, and that the defendant Richmond and wife made certain quitclaim deeds to defendants Connell and Marshall of said lands so sold to defraud plaintiffs and without their consent.

It is sufficient to say that the evidence fails to show any fraud on the part of Starr in the procurement of the original contract with Nodine, and none of the other defendants had anything to do with its inception, and Richmond and Wright were acting as trustees at the request of Starr and Nodine, but Starr was not agent or attorney for any of the defendants in that matter. The official relation of Marshall and Connell to the Ainsworth National Bank is admitted, but there is no evidence that any of them had anything to do with the management or disposition of any of the trustee property, except that Marshall, as cashier, in order to avoid the expense of foreclosing his mortgage upon a part of the plaintiff's land, caused an execution to issue upon the judgment which he had bought from Couper and

which was a prior lien to his mortgage, and had the lands sold and bought them in for the bank, all of which he had a legal right to do, for both the judgment and mortgage were prior in time to the transfers to the trustees, who took subject thereto. The only evidence upon which the plaintiffs relied to prove fraud and conspiracy upon the part of the bank or its officers in connection with the trustees in the sale under the Marshall judgment was the fact that Wright and Connell looked over plats of the lands and drove over the lands, and Wright pointed out to Connell the west boundary of the lands mortgaged to Marshall, who held for the bank.

There is no evidence whatever to support the charge of fraud in regard to the sale under the foreclosure decree of the Western Hawaiian Investment Company's mortgage. Eighty-four acres of the lands sold at this sale were bought by Townley for \$800, the sale confirmed and deed issued as in the other cases. The lands bought by him were separated from the main body by the investment company and adjoining other lands he had bought at the first sale. In each of these sales the judgment or mortgage lien existed long prior to the transfer from plaintiffs to the trustees, and each of the parties had a right to enforce the payment of his claim by the sale of any of or all lands upon which it was a lien. It is not contended that any of these claims were fraudulent in any way, but that the sales thereunder were collusive and fraudulent. The evidence fails to bear out the contention. Neither Marshall nor the bank of which he was a cashier was in any way connected with the plaintiffs or either of the trustees, and no duty rested upon them to refrain from buying plaintiff's lands at a sale based upon the judgment against him. The Western Hawaiian Investment Company was not connected in any way with the plaintiffs or the trustees, and had a perfect right to make the amount of its debt out of plaintiff's property. The Marshall judgment and investment company mortgage, both being prior in time to the transfer to the trustees, were also, it is conceded, prior in right thereto. No confidential relations existed between either Marshall or the bank he represented, or the investment company and Nodine

or the trustees. There was no fraud or collusion, and no interference of any kind in bidding at either of these sales.

3. The only remaining reason alleged for setting them aside, if any, is inadequacy of price. This court, in accord with the great weight of authority, has held in *Farmers' Loan Co. v. Oregon Pac. R. Co.*, 28 Or. 70 (40 Pac. 1093), "that mere inadequacy of price, where parties stand on an equal footing, and there are no confidential relations between them, is not of itself sufficient to set aside a sale, unless the inadequacy is so gross as to be proof of fraud, or to shock the judgment and the conscience." The plaintiff personally, as shown by his letters to Starr, had made an effort to sell his lands to pay his debts, and had failed. Starr, Richmond and Wright and all the various agents by them employed had likewise failed to sell the lands, and plaintiff had been willing to accept at one time an average of \$15 an acre if he could get out and have something left. After all this the lands bought by Marshall, being about 1,440 acres, were offered at public sale by the sheriff. Marshall's judgment then amounted to over \$2,000. It and taxes were a first lien upon 280 acres lying about $1\frac{1}{2}$ miles east of the remaining lands levied upon, which were contiguous and also subject to the lien of his judgment and taxes, and 1,040 acres thereof subject to a subsequent mortgage in his favor for \$4,000 and two prior mortgages for \$4,000 each in favor of Balfour, Guthrie & Co., while 40 acres of the remaining 160 were subject to a prior mortgage in favor of the Western Hawaiian Investment Company, with other lands, for \$5,000 under which they were taken from Marshall, and the 120 acres were subject to a mortgage for \$1,200 in favor of the Alliance Trust Company, making a total of claims against the property, other than taxes and the Marshall judgment, of over \$13,200, and, adding the taxes and judgment, the liens would exceed \$15,000.

4. There is evidence in the record that the entire Nodine tract was worth in 1894, 1895 and 1896 an average from \$15 to \$30 an acre, but much of it was swamp land, used for fall and winter pasture, and plaintiff claims in the original complaint filed in the other case, and which was introduced in evidence in this

case, that much of the meadow had been destroyed before 1896, when this sale occurred, and the evidence shows it had been badly flooded each spring by the waters of Catherine Creek, which flow through it, and was not in a good state of cultivation, being infested with fox tail and mustard to such an extent that portions of the crops had to be harvested in patches, and the evidence is strong throughout the record that it could not be sold at any reasonable price, even the lowest given by the witnesses. It is also in the record that after the Ainsworth National Bank had acquired title to the lands through the sale to Marshall, and had paid all taxes and other claims against them, it sold them for only \$19,800, and gave the purchasers long time in which to make their payments. These facts are not sufficient to support the claims of inadequacy of price so far as the sale to Marshall is concerned. The sale under the decree foreclosing the Western Hawaiian Investment Company mortgage is in practically the same condition. Eighty-four acres not included within the meander lines of Tule Lake were bought at that sale by defendant Townley for \$800, and the remainder, about 1,000 acres, mostly within the meander lines of Tule Lake, and title to which was in dispute and on appeal in this court at the time of sale, were bought by the investment company for the amount of its decree, less the \$800 bid by Townley, and afterwards sold for \$8,500, which was about the amount of its judgment, costs and expenses. In view of the foregoing facts and the financial conditions then existing, and the status of the lands sold as to incumbrances and title, we cannot say that the price bid was even inadequate, and it was clearly not so grossly inadequate as to be proof of fraud or to shock the judgment or conscience.

5. Plaintiffs vigorously contend that the sale to Townley under the bank execution should be set aside. The record shows that prior to the issuance of this execution Marshall had issued execution upon his judgment and levied upon a part of plaintiff's lands, and that the Farmers' & Traders' Bank of La Grande had brought suit against plaintiff to foreclose its mortgage upon other lands, and that plaintiff, having failed in his

efforts under the Starr contract to sell his land, thought that his lands must go to pay his debts, and so indicated to Wright, and suggested that the bank, whose customer he had been, try to save itself, and the execution was then issued, not through fraud or collusion as claimed, but practically at plaintiff's request. The judgment in favor of the bank was valid, and is not questioned, and it had been docketed in December, 1893, long before the transfer to the trustees, but was subsequent in time to the Marshall judgment. The execution on the latter judgment having already been levied upon certain lands, the execution on the bank's judgment was levied on the remaining lands of plaintiff, which were incumbered as heretofore stated and the title to the greater part thereof imperfect and in dispute in the foreclosure suit of the Farmers' & Traders' Bank, and also questioned by owners of lands bordering the Tule Lake, who claimed that Tule Lake was not swamp land, but a lake the bed of which belonged to them as riparian owners, and one of them so far asserted his claim in the summer of 1896 as to fence a large portion of the lands included in the Townley mortgage, but was afterwards ejected as a trespasser. The lands were sold at public auction by the sheriff, and it is claimed that Wright and Townley prevented competitive bidding, or, as it is sometimes called, "chilled the bidding," by falsely telling prospective bidders that the lands were greatly incumbered. The evidence on this point is to the effect that while the property was being offered for sale by the sheriff, in the presence of Wright and Townley at the courthouse, N. Schoonover came out of the courthouse and made a bid upon the property, which bid was raised by Townley, who then told Schoonover that the lands were being sold subject to mortgages thereon. Whereupon Schoonover went away and the lands were bought by Townley, the sale confirmed and deed issued without objection of any kind on the part of plaintiffs. Schoonover, when asked if he had been kept from bidding, answered, "No, sir; I could have gone on and bid for that matter." This was the only sale where anything was said about mortgages or liens by any one so far as the evidence shows, and the facts disclosed wholly fail to

prove the allegation of preventing competitive bidding, or that the representations made were false; but, on the contrary, the record shows that they were true. In *Leake v. Anderson*, 43 S. C. 458 (21 S. E. 439), a similar truthful statement made by an intending purchaser to other prospective bidders regarding the title to the land offered for sale was commended, "as it tended to prevent an unwary bidder from 'buying a lawsuit.'"

6. It is contended that the purchase was made by Townley for the joint benefit of himself, Wright and the Bank of Union, but this contention is largely based upon inferences drawn from the fact that Wright and Townley were connected with the bank at the time of the sale, the former as president and the latter as a director. So far as the bank and Townley were concerned, they owed no duty to the plaintiff, and either of them had a right to purchase at the sale for their individual or joint benefit so long as there was no collusion or fraud between them and any one who did owe a duty to plaintiff. The only evidence connecting Wright with this sale is in relation to the issuance of the execution and his presence at the sale, and the former was done at the suggestion of plaintiff, while the latter was the ordinary act of a bank officer in sales wherein his bank is interested. Even granting, as plaintiff claims, that Wright as well as Townley told Schoonover at the sale that the property was being sold subject to mortgages, it was the truth, and the same rule would apply as to the statement there made by Townley. The fact that Wright and Townley, officers of the bank, were present at the sale is not enough to warrant an inference that Townley bought for the joint benefit of all. Especially is this true in view of the fact that Townley testifies positively that he bought for himself and gives his reasons why he did so, and the sheriff's certificate of sale and the deeds thereunder were issued to him, and there is nothing in the record that contradicts these facts. It is true that some three years later, when he was vice-president of the bank, the certificate of sale for the lands bought by the Western Hawaiian Investment Company was assigned to him as trustee for the bank; but at this time the plaintiff and all the defendants herein had lost all rights to the land by fore-

closure sale, and the rights which he acquired as trustee for the bank and afterwards from it for himself were not acquired as a redemptioner or in any confidential or fiduciary character, but as a purchaser from one who had rightfully acquired all rights of the plaintiffs in the lands purchased, and not for the purpose of perfecting any questionable rights he might have in the property as against the plaintiff. We fail to see wherein the claim of purchase by Townley for the joint benefit of himself, Wright, and the bank is established.

7. Inadequacy of price is also relied upon and strenuously urged to set aside this sale. The same rule applies to this sale as to the sales to Marshall and the investment company cited, *supra*. Townley was not acting as trustee or in any confidential relation to the plaintiff or the trustees. He was merely a tenant whose rights were being interfered with by an execution issued at the request of plaintiff upon a judgment prior to his lease, and as such tenant he had a right to purchase the lands: 18 Am. & Eng. Enc. Law (2 ed.), 423. The plaintiff and at least one of the trustees knew of the issuance of the execution, and the trustee was present at the sale, and under such circumstances it cannot be presumed that the purchase was for the benefit of the trustees or the plaintiff.

8. The only question then is: Was the price so grossly inadequate as to come within the rule cited, *supra*? The mortgages upon these lands have been heretofore mentioned, and at the time of sale a foreclosure suit by the Farmers' & Traders' Bank of La Grande was pending, and the title to much of the 1,800 acres embraced in Tule Lake was in dispute, and owners of bordering fractional lots were claiming as riparian owners as heretofore stated. In addition to the judgment lien of the bank the mortgages heretofore referred to aggregated, with interest, about \$15,000, all prior to the judgment lien. Part of the lands were meadow lands, but floods during the three springs preceding the sale had greatly injured crops, and much of the land was foul with fox tail and mustard. Considering these facts, and the further fact that the lands bought by Brewster and the investment company were sold some time later for scarcely more than

the purchase price, and that, too, after the dispute as to riparian claims had been settled in favor of the lands, we are forced to conclude as in the other sales that the price was not inadequate.

The foregoing conclusions call for an affirmance of all that part of the decree appealed from by the plaintiffs.

9. The remaining questions relate to the quitclaim deed made by plaintiffs to defendant Connell January 8, 1897, and by Richmond and wife to Marshall and to Connell after the sale to Marshall. The record shows that after the sale to Marshall had been confirmed by the court and the sheriff's deeds issued to him in November, 1896, and he had conveyed to the bank, or J. C. Ainsworth as its representative, the bank was anxious to get its money out of the lands bought, but could make no disposition of them without first procuring the inchoate right of dower of plaintiff's wife, who had not been a defendant in the judgment under which it had sold and purchased the lands through Marshall, its cashier, or barring such right by foreclosure of the mortgages against the lands. Defendant Connell was sent to negotiate for her right, and after considerable delay a quitclaim deed was made to him by plaintiffs of all their lands that had been sold, and at the same time they assigned to him their interest in the suit then pending against the trustees and other defendants heretofore referred to, he at the time paying Nodine \$1,000, which he claims was for the deed, but plaintiff claims it was for the assignment of their interest in the suit. An agreement was also signed by Connell and plaintiffs' son that one-half of the results of the suit should go to the son, and this plaintiff testifies was for the benefit of plaintiffs, so that in effect the assignment was only for one-half of the results of the suit. The testimony of Connell and two other witnesses who were present, one of whom was wholly disinterested, is to the effect that the deed was procured to secure the inchoate dower interests of Mrs. Nodine and enable his bank to get its money out of the Nodine lands, while plaintiffs claim that the deed was an after consideration to the assignment of their interests in the suit and to assist Connell in prosecuting the suit, but both deed and assignment were signed at the same time. In view of the

fact disclosed by the record that Nodine had theretofore assigned the same interest in the lawsuit to a lawyer for the same purpose he assigned to Connell, and without other consideration than that of a promise to prosecute the suit, we think the contention of Connell, supported, as it is, by the evidence of a disinterested witness, the more reasonable that the quitclaim deed was given for a consideration and for the purpose claimed by him for the bank, and that the assignment of the interest in the lawsuit was for the purpose of having it prosecuted by him, especially does this appear reasonable in view of the fact that, so far as his bank and Marshall were concerned, a motion to strike out parts of the complaint in the suit had been allowed and they were virtually out of the case. Such being the case, the deed should stand, and, the plaintiffs having thereby parted with whatever interest they might then have had in the land, they could not now question the deeds made by Richmond and wife, whose interests had been sold under the executions.

10. As heretofore stated, the decree against Starr was entered upon an amended complaint not served upon him, and under Section 100, B. & C. Comp. and *Goodale v. Coffee*, 24 Or. 346, 356 (33 Pac. 990), this was error. It follows that the decree must be modified as to the decree against Starr and the defendants Marshall, Connell, and the Ainsworth Bank, and a decree entered here dismissing the suit as to them, and affirming the decree in all other respects.

11. Costs will be awarded to the defendants. **MODIFIED.**

Argued 24 October, decided 11 December, 1906.

PORTLAND v. COOK.

87 Pac. 772.

RIGHT TO DELEGATE POLICE POWER TO MUNICIPALITIES—CONSTITUTION.

1. The police power of a state, or a portion of it, may be delegated to a municipal corporation within the state, which then becomes an agent of such state with authority to use the power so delegated, but neither the state nor its agents can entirely relinquish this attribute of sovereignty.

CONSTITUTIONAL LAW—POLICE POWER—IMPAIRING OBLIGATION OF CONTRACTS BY REPEALING LICENSE.

2. A permission to conduct any business that may affect public health or morals, either through its inherent nature or the manner in which it

shall be carried on, must be necessarily subject to cancellation at any time under the police power, since it is merely a license and is not a contract.

HEALTH—REGULATION OF SLAUGHTERHOUSES UNDER POLICE POWER.

3. Though the conducting of a slaughterhouse is a legitimate business, and may have been properly authorized, it may, nevertheless, become so inappropriate or offensive through changes in the surroundings of the place where it is situated that it may be stopped at that location.

NUISANCE—SLAUGHTERHOUSE.

4. The occupation of a building in a city as a slaughterhouse is *prima facie* a nuisance to persons residing near it.

LIMIT OF POWER TO DECLARE NUISANCES.

5. Public authorities cannot arbitrarily declare that to be a nuisance which is not really so, although their action is very persuasive.

PERMIT TO CONDUCT SLAUGHTERHOUSE—CONTRACTS.

6. An ordinance granting permission to erect and maintain a slaughterhouse at a specified place within the city limits is not a contract by the municipality with the grantee, even if the latter expends considerable sums of money on the faith of the grant.

STATUTES—IMPLIED REPEAL.

7. The enactment of a law imposing a new penalty for an offense described by an existing statute, and not repealing the old law, will operate prospectively only, leaving the former in force as to acts committed prior to the time the new law goes into effect.

For instance: An ordinance or statute forbidding certain acts is not retroactively affected by a subsequent enactment permitting certain persons to perform such acts, and not in any way referring to the first law, for the latter is prospective only and even the beneficiaries of the second enactment may be prosecuted for violating the first law before the second was passed.

RELEVANCY OF EVIDENCE.

8. Under a prosecution for conducting a slaughterhouse in a locality where the business is forbidden, evidence as to the manner of conducting it is irrelevant.

EXAMPLE OF HARMLESS ERROR.

9. Where a trial for a misdemeanor is held without a jury, the defendants admitting the acts complained of, but claiming the right to commit them, the admission of irrelevant evidence is harmless.

From Multnomah: JOHN B. CLELAND, Judge.

Action by the City of Portland against several persons for violating a municipal ordinance. The defendants appeal from a judgment of conviction.

AFFIRMED.

For appellants there was a brief over the names of *Williams, Wood & Linthicum* and *Snow & McCamant*, with oral arguments by *Mr. Stewart Brian Linthicum* and *Mr. Zera Snow*.

For the City there was a brief over the names of *L. A. McNary*, City Attorney, and *Milton W. Smith*, with an oral argument by *Mr. Smith*.

MR. JUSTICE MOORE delivered the opinion of the court.

This action was commenced April 7, 1905, in the municipal court of Portland by that city against J. H. Cook, James M. Neal, and T. W. Bigger for an alleged violation of an ordinance, prohibiting the killing within the city limits of animals, the flesh of which was intended to be sold, and also forbidding the maintenance within such territory of a slaughterhouse. The cause was tried and the defendants were convicted, June 30th of that year, and severally adjudged to pay a fine, from which sentence they appealed to the circuit court for Multnomah County, where they were again tried on a stipulation of facts, a jury having been waived, and, their motion to be acquitted having been overruled, they were again found guilty, and appeal to this court from the judgment which followed. The facts so stipulated are to the effect that, pursuant to a clause of the municipal charter then in force, which authorized the council "to license, tax, control and regulate slaughterhouses, * * and to provide for their exclusion from the city or any part thereof" (Laws 1891, p. 806), Ordinance No. 9641 was passed, February 12, 1896, granting to "L. Zimmerman and his assigns" the right to establish and maintain on his land in the City of Portland, particularly describing the premises, a packing house for curing all kinds of meat, and to erect other buildings in which to slaughter animals. Thereafter Zimmerman, who then was, ever since has been, and now is, the owner in fee of the real property so described, erected thereon the specified buildings, expending in such improvements more than \$40,000; but subsequent thereto an ordinance was passed repealing Ordinance No. 9641. Notwithstanding such abrogation, Zimmerman thereafter continued to operate the business until November 1, 1901, when he leased the real property mentioned for a term of five years to the Northwestern Meat Company, a corporation which, with his consent, sublet the premises for the remainder of the term to the Pacific States Packing Company, a like artificial being. The defendants, Cook, Neal and Bigger, are the president, manager and secretary, respectively, of

the corporation last mentioned, and, as the agents thereof, were, on April 7, 1905, when this action was begun, engaged in killing, within the city limits and on the land so leased, animals the flesh of which was intended to be sold, and were also maintaining on such premises a slaughterhouse. At that time Ordinance No. 13,885, adopted April 6, 1904, was in force and provided that it should be unlawful for any person, within the city limits, to kill any animal the flesh of which was intended to be offered for sale, or to maintain or use, within such territory, any building as a slaughterhouse, and prescribing as a penalty for a violation thereof a fine of not less than \$5 nor more than \$300, or imprisonment not less than five days nor more than 90 days. After this action was commenced, but before it was tried in the municipal court, Ordinance No. 14,639 was passed, regulating the slaughter of animals and the inspection of meats, from which we take the following excerpts, deeming them the only parts thereof involved herein:

Section 3. "That from and after the passage of this act it shall be unlawful for any person, firm or corporation to slaughter, sell or offer for sale the meat of any animal not considered 'game,' intended for human food, within the City of Portland, unless the same has been inspected and approved by the officers appointed and empowered by the city board of health * *

Section 6. "That the Pacific States Packing Company be known as 'the Portland Abattoir' where animals may be taken for slaughter and be inspected, and that not more than the following prices may be charged and collected by the person or corporation who now are or who may hereafter be operating the Portland Abattoir, or such other place or places as may be fixed by the board of health for slaughtering animals intended for human food within the City of Portland. * *

Section 15. "That the firm, person or corporation violating any of the provisions of this ordinance shall, upon conviction, be fined not less than ten (\$10.00) dollars, nor more than twenty-five (\$25.00) dollars for each offense. * *

Section 16. "That this ordinance shall take effect from and after its passage, the welfare of the city requiring it."

It is contended by defendants' counsel that, conformable to the provisions of the municipal charter quoted, Ordinance No.

9641 was passed, granting to Zimmerman the rights hereinbefore stated, acting on the faith of which he expended a vast sum of money in making permanent improvements upon the real property specified, whereby such right became a subsisting contract between him and the city which could not be impaired by subsequent legislation; that, the grant having also been extended to his assigns, the defendants, as agent of the corporation which secured a lease of the premises with his consent, had the same authority that he possessed to conduct the business thereat, subject only to municipal regulation that the slaughterhouse should not become a public nuisance or detrimental to the health of persons residing in the vicinity, and hence the circuit court erred in refusing to give a judgment of acquittal.

1. The preservation of the public health and public morals is a duty devolving on the state, the discharge of which is denominated an exercise of the police power. This prerogative, though incapable of exact definition or limitation, may be delegated by the state to its agent, a municipal corporation, which is authorized to employ the measure of authority conferred. As the perpetuity of a stable government necessarily depends upon the security of the public health and the maintenance of public morals, neither the state nor its agent can bargain away this branch of sovereignty.

2. As a corollary deducible from this principle, it results that any permission by statute or ordinance whereby such authority is temporarily surrendered is only a license, a cancellation of which is not violative of a state or of the federal constitution prohibiting the passage of laws impairing the obligation of contracts. Thus a grant of the right to maintain a lottery, for which money has been given, will not prevent a repeal of the authority to conduct such business: *Boyd v. Alabama*, 94 U. S. 645 (24 L. Ed. 302); *Stone v. Mississippi*, 101 U. S. 814 (25 L. Ed. 1079); *Douglas v. Kentucky*, 168 U. S. 488 (18 Sup. Ct. 199, 42 L. Ed. 553). A license to manufacture or sell intoxicating liquor does not create a contract, and for that reason the privilege may be annulled before the expira-

tion of the term for which it was given: *Beer Co. v. Massachusetts*, 97 U. S. 25 (24 L. Ed. 989); *State ex. rel. v. Bonnell*, 119 Ind. 494 (21 N. E. 1101); *Fell v. State*, 42 Md. 71 (20 Am. Rep. 83); *State v. Cooke*, 24 Minn. 247 (31 Am. Rep. 344); *Wallace v. Mayor*, 27 Nev. 71 (73 Pac. 528, 63 L. R. A. 337, 103 Am. St. Rep. 747).

3. Though the slaughtering of animals, the flesh of which is designed for human food, does not tend to corrupt the public morals and is a legitimate business, which may be classed by some as a necessity, the place where it is conducted may, by reason of its proximity to the residence portion of a city or village, demand its removal, notwithstanding it may have been established pursuant to a statute or an ordinance authorizing it: *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746 (4 Sup. Ct. 652, 28 L. Ed. 585); *Villavaso v. Bartlet*, 39 La. Ann. 254 (1 South. 599). As illustrative of this principle see, also, *Fertilizing Co. v. Hyde Park*, 97 U. S. 659 (24 L. Ed. 1036). All property is acquired and held subject to the rule that it shall be so used as not to injure another, and, though at the time of establishing a lawful enterprise in a place where the probability of injury to others arising therefrom is remote, if the undertaking should become offensive by reason of many persons moving into the vicinity or passing it daily, whereby the public health is menaced, the business must yield to the paramount right of an exercise of the police power for the suppression of nuisances: *Coates v. Mayor of New York*, 7 Cow. 584; *Brady v. Weeks*, 3 Barb. 157.

4. The occupation of a building in a city as a slaughter-house is *prima facie* a nuisance to persons residing near it: Wood, Nuisance (3 ed.), § 571; *Catlin v. Valentine*, 9 Paige 575 (38 Am. Dec. 567).

5. Though under a general grant of power over the subject a common council has no authority to adopt an ordinance declaring a thing a nuisance which in fact is not one, yet in doubtful cases, depending upon a variety of circumstances requiring an exercise of judgment and discretion, their action is conclusive, and, pursuant to such grant, they are empowered to

adopt an ordinance declaring a slaughterhouse within the corporate limits a nuisance: *Harmison v. City of Lewiston*, 115 Ill. 313 (38 N. E. 628, 46 Am. St. Rep. 893).

6. Ordinance No. 9641, pursuant to and upon the faith of which Zimmerman made valuable improvements upon his real property, did not, in our opinion, create a contract between him and the municipality, and the common council were authorized, when the public health so demanded, to repeal the law and to cancel the license granted to him, as was done December 2, 1897, by the passage of Ordinance No. 10,560; for, the authority to provide for the exclusion of slaughterhouses from the city or any part thereof having been expressly granted (Laws 1891, p. 806), of which Zimmerman is presumed to have had knowledge, the exercise of the power thus conferred must be as efficacious as though the council had been granted authority to declare what constituted a nuisance and to provide for the abatement thereof.

7. It will be remembered that, after the repeal of the ordinance granting to Zimmerman the right to maintain a packing house, etc., the council, on April 6, 1904, passed Ordinance No. 13,885, making it unlawful for any person to slaughter within the city limits any animal the flesh of which was intended to be offered for sale. At that time the city charter had been amended in some particulars, but the clause hereinbefore quoted had not been materially changed, and now confers upon the council the following authority:

"To regulate, restrain, and to provide for the exclusion from the city, or any part thereof, of * * slaughterhouses." Sp. Laws 1903, pp. 3, 30.

Based on this grant of power, the remaining question is whether or not the passage of Ordinance No. 14,639, without referring to Ordinance No. 13,885, was a repeal thereof by implication so far as it relates to the Pacific States Packing Company, and, as the abrogating ordinance does not contain a saving clause respecting violations of the prior law or of penalties incurred thereunder, but was passed before the judgment was rendered, was an error committed in refusing to acquit the defendants?

The repeal of a law imposing a penalty will prevent any trial or judgment for an offense committed against it while it was in force, unless the annulling act expressly stipulates to the contrary or the penalty may be inflicted under some existing general law: Endlich, Int. Stat. § 478; Sutherland, Stat. Const. § 166. "Where, however," says the latter author (section 143), "the new statute contains no reference for repeal or otherwise to existing statutes, and defines an offense made punishable by a prior law, and imposes a new punishment, it will not repeal such prior law as to existing cases; for, as the new law will only operate prospectively, there is, as to offenses already committed, no conflict. The prior law will operate as to all offenses against it committed up to the time that the new law goes into effect, and the trial may be had and judgment pronounced afterwards." Without quoting from, or commenting upon, some of the provisions of Ordinance No. 14,639, we shall, without deciding the question, assume that the enactment licensed the Pacific States Packing Company to operate a slaughter-house on the premises which were leased from Zimmerman, but, as the ordinance relates to the killing of animals within the city "from and after the passage of this act," which by its terms went into immediate effect, and prescribes penalties for a violation thereof different from Ordinance No. 13,885, it did not repeal the latter act in respect to violations thereof committed prior to the passage of Ordinance No. 14,639. *Commonwealth v. Wyatt*, 6 Rand. (Va.) 694; *Commonwealth v. Pegram*, 1 Leigh (Va.) 569; *Allen v. Commonwealth*, 2 Leigh (Va.) 727; *Pitman v. Commonwealth*, 2 Rob. (Va.) 800; *Miles v. State*, 40 Ala. 39; *Mongeon v. People*, 55 N. Y. 613.

8. At the trial in the circuit court testimony was received, over objection and exception, to the effect that the operation of the slaughterhouse by the Pacific States Packing Company tended to create a nuisance. The defendants were charged with unlawfully killing within the city limits, animals, the flesh of which was intended to be sold, and also maintaining within such territory, a slaughterhouse. The testimony so objected to was therefore irrelevant.

9. As the cause was tried without the intervention of a jury and the defendants admitted the charge but claimed immunity therefrom, the error complained of is not material, and hence the judgment is affirmed. **AFFIRMED.**

Argued 5 November, decided 11 December, 1906.

HARVEY v. LIDVALL.

87 Pac. 895.

TROVER—SUFFICIENCY OF COMPLAINT.

1. In trover, a complaint, alleging that plaintiff was the owner and in possession of the property and entitled to such possession at the time of the conversion, is sufficient, and an additional allegation that the possession was as a mortgagee does not render the complaint objectionable on the ground that it states a mere conclusion. It is not necessary to set out the mortgage either in *habeo verba*, or in substance or legal effect.

TROVER—EFFECT OF POSSESSION BY PLAINTIFF.

2. In trover a showing of possession by the plaintiff establishes his case against a motion for an involuntary nonsuit.

From Umatilla: WILLIAM R. ELLIS, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action of trover by M. M. Harvey against Victor Lidvall. It is alleged in the complaint that on the ——— day of November, or the ——— day of December, 1903, plaintiff was the special owner as mortgagee, and at the same time was mortgagee in possession, and entitled to the possession, of a three-fourths interest in and to a certain crop of grain grown and harvested during the season of 1903, from the southeast quarter of section 29, township 3 N., range 31 E. W. M.; that said grain was in the form of headings stacked upon the land described and in the possession of an agent of the plaintiff in process of foreclosure; that it amounted to 24 tons of the reasonable value of \$12 per ton or \$288 in the aggregate; that at said time and place the defendant wrongfully and without authority entered upon said premises, and took possession of all said headings and converted the same to his own use to plaintiff's damage in the sum of \$288, the value thereof, and \$100 special damages. The answer denies the allegations of the complaint and affirmatively alleges that, at all the times mentioned, defendant was the owner of the grain described

therein. The plaintiff filed a reply, setting up in detail the execution of the mortgage under which she claims, alleged a breach of the conditions thereof, and that for the purpose of foreclosure she entered into possession of the mortgaged property and, during the process of such foreclosure, the defendant wrongfully and unlawfully took possession thereof, and converted it to his own use.

To sustain the issues on her part the plaintiff produced a chattel mortgage from one John Thomas to her covering among other property, an undivided three-fourths interest in a crop of grain to be grown during the season of 1903 on the southwest quarter of section 29, township 3 N., range 31 E. W. M., and offered to show that the mortgage was intended by the parties thereto to cover the grain to be grown on the southeast quarter of such section, but by mistake the land was misdescribed therein; that the defendant who was the owner of the real estate described in the complaint, was familiar with all the transactions out of which the mortgage arose, and knew that it was intended to cover the grain to be grown on such property; that he was not only present and observed the harvesting of the grain, but that he had divided the same in accordance with the terms of his lease to the mortgagor, and had taken possession of his share; that the grain in controversy was taken possession of by the mortgagee plaintiff under the terms of the mortgage at a time when defendant and all parties recognized and believed that the mortgage described the property intended to be included therein; and that she became a mortgagee in possession before the error in the description was discovered. This offer was refused, the evidence excluded and the plaintiff nonsuited.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Stephen Arthur Lowell*.

For respondent there was a brief over the name of *Winter & Collier*, with an oral argument by *Mr. John Peter Winter*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. To support the ruling of the trial court it is contended

that the complaint does not state facts sufficient to constitute a cause of action because the mortgage, under which plaintiff claims, is not set out in the complaint, either *in haec verba*, or in substance, or legal effect. It has been held that, in an action by a mortgagee after condition broken, to recover possession of the mortgaged property, or in trover for its wrongful conversion, it is sufficient for plaintiff to allege generally that he is the owner and entitled to the possession, without setting out the source of his title: *Reinstein v. Roberts*, 34 Or. 87 (55 Pac. 90, 75 Am. St. Rep. 564); *Mayer v. Stephens*, 38 Or. 512 (63 Pac. 760, 64 Pac. 319). And we think the complaint, in the case at bar, comes within this rule. It is alleged that plaintiff was the owner and in possession of the property in controversy and entitled to such possession at the time of the alleged conversion by the defendant. The averment that her ownership and possession were special and as a mortgagee, was unnecessary, but it did not render the complaint objectionable on the ground that it stated mere conclusions of law.

2. It is next contended that the proof offered by the plaintiff was inadmissible because parol evidence is not competent in an action at law for the purpose of showing a misdescription of the property intended to be included in a chattel mortgage. As a general rule, this may be conceded: *Hutton v. Arnett*, 51 Ill. 198; *First National Bank v. Hendrickson*, 61 Minn. 293 (63 N. W. 725). But the plaintiff offered to go further and show that before the error in the mortgage was discovered she had commenced to foreclose it, and had taken possession of the property intended to be mortgaged, and was in such possession at the time of its alleged conversion by the defendant, and this was sufficient to entitle her to maintain an action of trover therefor against a wrongdoer. "It is very generally recognized," say the editors of the American and English Encyclopedia of Law, "that the possession of chattels, conferring, as it does, title good as against every one but the true owner, will enable the person in possession to maintain trover therefor against a wrongdoer who takes the chattels from his possession and wrongfully converts them, and the wrongdoer cannot

set up the title of the true owner in defense to the action, or even in mitigation of damages." 28 Am. & Eng. Enc. Law (2 ed.), 674. The complaint alleges, and the plaintiff offered to prove, that she was in possession of the property in controversy at the time it was taken by the defendant, and this was sufficient to make out a *prima facie* case in her favor.

Judgment reversed and remanded for new trial.

REVERSED.

MR. JUSTICE HAILEY, having been of counsel, took no part in the decision.

Argued 5 Nov., decided 11 Dec., 1906; on rehearing 2 July, 1907.

BOOTHE v. SCRIBER.

87 Pac. 387.

APPEAL—COMPUTING TIME TO FILE TRANSCRIPT.

1. The time allowed after perfecting an appeal within which a transcript must be filed in the appellate court does not begin to run until the time allowed to except to the sureties has expired, computed by excluding the first day and including the last.

To illustrate: A party having filed an undertaking on appeal on August 24th, the adverse party has five days to except and the appellant thirty days thereafter to file the transcript, which will expire on September 29th, and a filing on that day is within the time limited.

PAYMENT—EVIDENCE—COMPETENCY.

2. On an issue as to whether defendant, who was the cashier of a bank, had by various payments repaid to plaintiff a sum of money belonging to plaintiff which had been appropriated by defendant, defendant produced a draft issued by his bank payable to plaintiff, and paid to him, and testified that he purchased it, and sent it to plaintiff at his request, and that it was not charged on the bank books to plaintiff. *Held*, that the draft and testimony were competent as tending to show a payment.

SAME.

3. Defendant produced a draft drawn by plaintiff on defendant's bank payable to another bank and paid, and testified that he paid it out of his own funds. Plaintiff had an open account in the bank. *Held*, that the evidence was incompetent, as the records of the bank were proper evidence as to who paid the draft, and presumably the draft was paid from plaintiff's funds or charged to his account.

SAME.

4. Notes given by plaintiff to defendant's bank and marked "paid" by the bank, and as to which defendant testified that they were paid by him at plaintiff's request, were competent evidence.

SAME.

5. Defendant produced three notes made by plaintiff to defendant's bank, having attached thereto a check of defendant payable to plaintiff or bearer for a sum in excess of the notes, and testified to a settlement with plaintiff, and that at plaintiff's request he paid the notes, by giving (48th Or.—36)

the check attached, and that the difference between the amount due on them and the check was paid to plaintiff in cash, and the check charged to his account on the bank books. *Held*, that the notes and check were properly admitted.

SAME.

6. Defendant testified that at various times he deposited sums to the credit of plaintiff, and offered in evidence deposit slips made out in his handwriting, and though he testified that he took the slips from the bank files, it was not shown that any of them were ever delivered to the bank or that it became liable for such deposits. *Held*, that the slips were incompetent evidence.

SAME—INSTRUCTIONS.

7. An instruction that as to the items claimed as a defense by defendant, "if a defense here they cannot be claimed as a defense by the bank in its action," was erroneous as misleading, the bank not being a party to the action.

From Union: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is an action to recover money by S. S. Boothe against J. W. Scriber. On November 28, 1898, the plaintiff delivered to the defendant \$10,625, to be used in the purchase of 100 shares of the capital stock of the Farmers' & Traders' National Bank of La Grande. The stock was to have been purchased within 30 days, but the defendant failed or was unable to make such purchase and retained the money, making payments on account thereof to the plaintiff from time to time, as demanded, for a period of about seven years. During all this time he was the cashier of the Farmers' & Traders' National Bank, and the plaintiff had, in addition to the amount due him from defendant, an open account with the bank and from time to time was depositing money with and giving notes to it, and drawing checks and drafts on his account. It was a part of the manner of doing business between the plaintiff and the defendant and the bank that checks and drafts drawn by plaintiff on the bank were sometimes paid by the bank out of plaintiff's funds and at other times they were paid by the defendant out of the money due from him to the plaintiff, without being entered upon the bank books, and at still other times they were paid by the bank, the defendant depositing funds with it to the credit of the plaintiff to meet the same, and it was understood and agreed by and between the plaintiff and

defendant that any payments and deposits made by him on plaintiff's account were to be considered as payments on the amount due from him to the plaintiff. All checks, drafts, certificates of deposit, notes, etc., passing between the plaintiff and the bank, or between plaintiff and the defendant, were, during all these times, kept by the bank and the defendant, and not returned to the plaintiff. This action was commenced in January, 1906, against the defendant to recover \$6,046.76, alleged to be due plaintiff from him on account of the \$10,625 delivered to him in November, 1898. The defendant claims and alleges in his answer that he has paid to plaintiff in the manner above stated on account of the transaction mentioned in the complaint \$476.90 more than was due him, and prays judgment in that amount. The case was tried by the court and a jury, and resulted in a verdict and judgment in favor of the defendant for \$463. From this judgment the plaintiff appeals, assigning error in the admission of testimony, and in the giving of instructions. The undertaking on the appeal was served and filed on the 24th of August, 1906, and the transcript was filed with the clerk of this court on September 29th, following.

REVERSED.

For appellant there was a brief with oral arguments by *Mr. Leroy Lomax* and *Mr. Gustav Anderson*.

For respondent there was a brief with oral arguments by *Mr. Thomas Harrison Crawford* and *Mr. James Davis Slater*.

MR. CHIEF JUSTICE BEAN delivered the opinion of the court.

1. The defendant moves to dismiss the appeal on the ground that the transcript was not filed within the time allowed by law. The statute requires the transcript on appeal to be filed with the clerk of this court within 30 days after the appeal is perfected: B. & C. Comp. § 553. The appeal is not perfected until the expiration of the time allowed by law to except to the sufficiency of the sureties: *Callahan v. Portland, etc., R. Co.* 17 Or. 558 (21 Pac. 870); *Cook v. Albina*, 20 Or. 190 (25 Pac. 386). The adverse party, or his attorney, is required to except to the sufficiency of the sureties within five days after the

service of the undertaking: B. & C. Comp. § 549, subd. 2. The time in which these several acts shall be done is to be computed by excluding the first day and including the last: B. & C. Comp. § 531. Now, the undertaking was served on the 24th of August. Computing the time for excepting to the sufficiency of the sureties, according to the rule stated, the defendant had all of the 29th in which to file such exceptions. The appeal, therefore, was not perfected until the close of that day. Within 30 days thereafter, the appellant was required to file his transcript. Computing the time by excluding the first day on which the transcript could lawfully have been filed, which was the 30th of August, the 30 days did not expire until the 29th of September; and, as the transcript was filed on that day, it was within the time. The motion to dismiss will therefore be overruled.

2. The first assignment of error is the admission in evidence on behalf of the defendant of a draft for \$125, issued by the Farmers' & Traders' National Bank on the First National Bank of Union, payable to the order of the plaintiff, and which was indorsed by and paid to him by the drawee bank. The defendant produced this draft on the trial, and testified that he purchased it of the issuing bank, and sent it to plaintiff at his request, and that it was not charged on the books of the bank to plaintiff. The draft was, therefore, we think, competent in connection with the testimony of the defendant, as tending to show a payment by him to plaintiff, and is corroborative of his oral testimony. The books of the bank, showing the transactions in connection with the draft, would undoubtedly have been more satisfactory evidence than the oral testimony; but that matter affected the weight, and not the competency, of the evidence. If, in fact, defendant purchased the draft with his own money, and forwarded it to the plaintiff, and it was cashed by him and the proceeds appropriated to his own use, it would be a payment by defendant to plaintiff of the amount of such draft. And this is what the evidence tended to show.

3. The second assignment of error is based on the admission as evidence of payment by defendant to plaintiff of a draft

drawn by the plaintiff on the Farmers' & Traders' National Bank, payable to the First National Bank of Baker City. The defendant testified that when this draft was presented for payment to the payee bank: "I took care of it and paid it out of my own funds." But the draft, as offered and admitted in evidence, is not corroborative of this testimony. It shows a transaction between the plaintiff and the drawee bank, and there is stamped on the face of it by the bank the word "Paid." It was evidence of a payment by the bank to plaintiff, but not of the payment of money by defendant to plaintiff or on his account without showing that the draft was not paid from the funds of the plaintiff or that defendant deposited with the bank to plaintiff's credit money with which to take care of it. It was drawn by the plaintiff on a bank in which he had an open account, and paid by such bank, presumably out of the funds of the drawer or charged to his account, and it is not perceived how the defendant, who is the cashier of the bank, can claim credit as against the plaintiff for such payment by simply producing the draft from the bank files and testifying that when presented it was paid by him, without producing the bank records. In the nature of things the draft must have passed through the bank, and its records are the proper evidence of its payment and by whom. The same rule will apply to the draft for \$100 drawn by plaintiff on the Farmers' & Traders' National Bank in favor of Will Wright.

4. The third, fourth, fifth and sixth assignments of error relate to the admission in evidence of four promissory notes given by the plaintiff to the Farmers' & Traders' National Bank. These notes were produced on the trial by the defendant marked "Paid" by the bank, and he testified that they were paid by him at the request of the plaintiff or by his authority. They were, therefore, in our opinion, competent evidence, and properly admitted. If the defendant, at plaintiff's request, or by his authority, paid notes due the bank from him, and thus obtained possession of such instruments, they are competent evidence in an action between the plaintiff and the defendant in which such payment is in dispute. The payment of a

negotiable instrument may be made by any person liable thereon or by his agent, and the party making the payment has a right to demand the possession of the instrument: Tiedeman, Com. Paper, §§ 372, 373. If, as defendant testifies, he made the payment as agent of the plaintiff, the possession of the notes with the cancellation of the payee thereon was presumptive evidence that they had been paid and were admissible as such: *State v. Brooks*, 85 Iowa, 366 (52 N. W. 240).

5. Assignment No. eight is based on the admission in evidence of three promissory notes made by the plaintiff to the Farmers' & Traders' National Bank for \$100, \$150 and \$200, respectively, and having attached thereto a check of defendant, payable to plaintiff or bearer for \$601.31. The defendant testified in relation to these notes and check that on or about October 1, 1903, he had a settlement with the plaintiff, and, at plaintiff's request, took up and paid the three notes by giving the check attached, and that the difference between the amount due on them and the check was paid to plaintiff in cash, and the check charged to his account on the bank books. The notes were properly admitted for the reasons given in the preceding assignment of error. The check was a part of the same transaction, and attached to the notes, and was likewise competent for whatever the jury might consider it worth.

6. To prove certain alleged payments, the defendant testified that on the dates and at the times mentioned, he deposited with the Farmers' & Traders' National Bank certain sums to the credit of the plaintiff, and as evidence of such deposits produced and there were admitted in evidence over plaintiff's objection and exception, sundry memoranda or deposit tags, such as are generally made out by or for a depositor in a bank, and handed in with his deposit book, stating the amount he is depositing. These memoranda or tags were in the handwriting of the defendant, and it does not appear that any of them were ever delivered to or received by the bank, or that the bank in any way became liable to plaintiff on account of such alleged deposits. It is therefore manifest that standing alone they were not competent evidence to show that defendant had paid

money to the bank on plaintiff's account. They were not made out by the bank or any of its officers for it, and were not acknowledgments or admissions by the bank of the receipt of the money. The fact that the defendant testified that he took the slips from the bank files did not make them competent evidence of the receipt of money by the bank. He was the cashier, had the custody of the bank's papers and files, and it would have been an easy matter for him if he had been so disposed to have made out deposit slips or tags at pleasure, and placed them among the bank files without the bank in any way being bound thereby. Before such slips are competent evidence of the payment of money by the defendant to the bank on plaintiff's account there should be some showing that the plaintiff had received credit therefor on the bank books or that the bank had in some way acknowledged liability for the amount thereof and become bound to pay the same.

7. The remaining assignments of error relate to the instructions of the court. It is unnecessary, in view of a new trial, to notice any of them except the one that "as to items claimed as a defense here by Mr. Scriber, if a defense here, they cannot be legally claimed as a defense by the bank in its action." This instruction, while it may be sound as an abstract proposition of law, was, we think, improper and misleading to the jury. It appeared that during the transactions in dispute between the plaintiff and the defendant, the plaintiff had an account with the bank, and that there was a controversy between him and the bank as to the state of such account. The instructions, as given, would probably lead the jury to believe that it was not very important whether the defendant satisfactorily made out his defense of payment, because plaintiff would receive credit on his account with the bank with any amount they might allow the defendant and, therefore, could not be injured. The bank, however, was not a party to this action, and would not be bound in any way by the result. Any credit the jury might allow the defendant for money alleged to have been paid to him by the bank for plaintiff's benefit would not preclude the bank from denying such payment, unless it had in fact been made

or the bank had become liable to plaintiff therefor. The fact that the plaintiff was at the same time dealing with the defendant in his individual capacity, and as cashier of the bank, renders it difficult to keep the several transactions separate; but it is important for the rights of all parties that it should be done as nearly as possible.

It follows from these views that the judgment of the court below must be reversed, and the cause remanded for a new trial.

REVERSED.

Decided 2 July, 1907.

ON REHEARING.

For appellant there was an oral argument by *Mr. Leroy Lomax*.

For respondent there was an oral argument by *Mr. James Davis Slater*.

PER CURIAM: A reargument and re-examination of the question, as to whether the transcript in this case was filed within the time provided by law, has confirmed us in the conclusion heretofore reached. Upon an appeal being perfected, the appellant shall, within thirty days thereafter, file with the clerk of the appellate court his transcript, etc.: B. & C. Comp. § 553. From the expiration of the time allowed to except to the sufficiency of the sureties in the undertaking, or from the justification thereof, if excepted to, the appeal shall be deemed perfected: § 549. No exceptions were filed to the sufficiency of the sureties in this case, but the time in which to file such exceptions did not expire until the last moment of the 29th of August, and, therefore, the appeal was not perfected so that the appellant could have filed his transcript until the first moment of the following day or the 30th. Excluding the 30th, the date on which the appeal was perfected, the time in which to file the transcript expired on the 29th of September, and as it was filed on that date, it was within time. Former opinion adhered to.

REVERSED: AFFIRMED.

Decided 11 December, 1906.

MORRISON v. OFFICER.

87 Pac. 396.

WATERS—RIGHT TO SMALL SPRING—STATUTE.

Section 5019, B. & C. Comp., conferring on the owner of land on which spring or seepage water issues the right to use such water, was intended to give such water to such owner, and he may prevent it from passing off his own land.

From Grant: GEORGE E. DAVIS, Judge.

Suit for an injunction, decree for plaintiff and defendant
appeals. REVERSED.

For appellant there was a brief and an oral argument by
Mr. Errett Hicks.

For respondent there was a brief over the name of *V. G. Cozad*, with an oral argument by *Mr. William Rufus King.*

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit by Finlay Morrison against Floyd L. Officer to enjoin interference with the use of water issuing from a spring. The facts are that, on December 5, 1894, the State of Oregon executed to the defendant a deed to the northwest quarter of the southeast quarter of section 36 in township 11, south of range 25 east in Grant County, ever since which he has been the owner in fee thereof. The state, on February 15, 1901, also entered into a contract with the plaintiff for the sale of the northeast quarter of the southeast quarter of that section, township, and range, and five years thereafter he dug a ditch from a swale on the land last described, and conducted to a part thereof water which he intended to use in irrigating a garden. The defendant thereafter cut two ditches on his land from such swale, and diverted all the water therein, whereupon this suit was commenced, resulting in a decree as prayed for in the complaint, and he appeals.

The testimony shows that a perennial spring issues from the defendant's land at a point about 120 yards from the east line thereof, the water from which reaches a point about 150 yards on the plaintiff's premises where it disappears. Though there is a conflict in the testimony, we think the great weight thereof supports the defendant's contention that the water

does not usually appear on the surface, but, issuing from the spring on the side of a hill, it makes its way, without channel or banks, through brush and grass, moistening the ground for a space about 30 feet in width, the distance mentioned, and that where cattle have made tracks in the damp soil, water may be seen, but it does not flow until confined in a ditch. No controversy exists as to the quantity of water which the spring affords, for each party admits that it does not exceed three-fourths of an inch, miners' measurement. The statute regulating the use of water, contains the following clause:

"Provided, that the person upon whose land seepage or spring waters first arise, shall have the right to the use of such waters:" B. & C. Comp. § 5019.

This act was passed February 22, 1893 (Laws 1893, p. 150), when the state was the owner in fee of the lands hereinbefore described. The clause adverted to is, in our opinion, a grant of the exclusive right to the use of the unappropriated water specified to the person upon whose land such water first arises, and was probably a recognition of a practice prevailing in the arid region of the United States, that the title to lands containing water issuing from the sources mentioned had been secured, so that the water might be used for domestic or stock purposes, and that the quantity indicated did not appear to the legislative assembly to be more than was reasonably necessary to supply such use.

When a spring furnishes a stream of water that rises to the surface, the right of appropriation attaches (*Brosnan v. Harris*, 39 Or. 148, 65 Pac. 867, 54 L. R. A. 628, 87 Am. St. Rep. 649), but where, as in the case at bar, the admitted quantity is so insignificant that a surface stream is impossible, when spread over the width of ground mentioned, the use of the water belongs to the person upon whose land it first arises. A small part of plaintiff's land was, before the diversion, moistened by water from the spring, and it is possible that such portion might be classed as a "water course," on the theory that the law of gravitation compelled the water to take that direction because of the conformation of the land. The testi-

mony shows, however, that there are no banks to such course on plaintiff's premises, and, unless there is a bank or ripa on his land, he cannot be a riparian proprietor within the meaning of that term. The disposal of the use of water may be controlled by the legislature when its acts designed for that purpose do not violate the fundamental law by trenching upon the rights of property, and, believing that in the present instance the clause of the statute quoted does not invade such provisions, and that the plaintiff secured his contract of purchase with knowledge of the act, the decree is reversed and the suit dismissed.

REVERSED.

Decided 11 December, 1906.

WILLIAMS v. FIRST NATIONAL BANK.

87 Pac. 890.

ACTUAL NOTICE OF LIEN.

1. The statement by one of the payees of a note to the cashier of a bank at which he left it for collection, that he had a mortgage on the maker's sheep to secure the note constitutes actual notice to such bank of the mortgage so referred to, though it also secured the payment of another note that was not referred to.

EFFECT OF RECORD OF UNACKNOWLEDGED CHATTEL MORTGAGE.

2. Under Sections 5630 and 5631, B. & C. Comp., providing that chattel mortgages "shall" be acknowledged by the maker and that "such" mortgages may be recorded, an unacknowledged chattel mortgage is not entitled to be recorded and its presence in the record books does not impart to any one notice of its existence.

EFFECT OF ACTUAL KNOWLEDGE OF PRIOR CHATTEL MORTGAGE.

3. Persons taking chattel mortgages on property with actual knowledge of a prior mortgage are not mortgagees "in good faith" within the meaning of Section 5633, B. & C. Comp., and their mortgages are not entitled to precedence, though the prior mortgage was unacknowledged, in consequence of which its actual record was not notice.

CHATTEL MORTGAGE—REMOVAL TO ANOTHER COUNTY—KNOWLEDGE.

4. The effect of actual knowledge of an existing prior unrecorded chattel mortgage is not affected by a removal of the property to another county, Section 5632, B. & C. Comp., being applicable only to subsequent lienors for a valuable consideration and without notice.

From Grant: GEORGE E. DAVIS, Judge.

Statement by MR. JUSTICE HAILEY.

This is an action by S. S. Williams and another against the First National Bank of Ontario and others to recover possession of 2,316 sheep mortgaged to plaintiffs by L. S. Wicker-

sham, the owner thereof, who afterwards mortgaged them to the defendant bank, which claims a right to their possession under its mortgage. The case was tried by the court without the intervention of a jury, upon an agreed statement of facts, from which it appears that on August 2, 1902, Wickersham gave plaintiffs a mortgage upon the sheep in controversy to secure the payment of \$4,125, part of the purchase price thereof, evidenced by two notes, one for \$500 due July 15, 1903, and the other for \$3,625 due September 15, 1904, with interest at 10 per cent per annum from September 15, 1902, payable annually, which mortgage was properly executed and witnessed but not acknowledged, and was, on October 1, 1902, recorded in Malheur County, and on July 8, 1904, in Grant County; that on July 8, 1903, Wickersham gave the defendant First National Bank of Ontario a mortgage on the same sheep to secure the payment of a promissory note for \$500 that day executed by him to the bank, and due in six months after date, which mortgage was properly executed, witnessed, and acknowledged, and on the next day recorded in Malheur County, and afterwards, on the 29th day of June, 1904, recorded in Grant County, to which latter county the sheep covered by said mortgages had been removed on the 15th day of June, 1904. In July, 1904, the defendant bank obtained possession of all the sheep covered by its mortgage by an action of claim and delivery commenced by it against the mortgagor Wickersham, and thereafter, on July 13, 1904, the plaintiffs commenced this action of claim and delivery for the sheep against the bank and other defendants herein, but, according to the stipulated facts, the other defendants have no interest in this action.

It is further agreed that on the ——— day of June, 1903, prior to the execution and delivery by Wickersham of the mortgage to the defendant bank, one of the plaintiffs, I. S. Goodwin, went to the bank and left with E. H. Test, its cashier, for collection, the \$500 note secured by plaintiffs' mortgage, "and then and there informed the said cashier that he, the said Goodwin, and S. S. Williams had a chattel mortgage upon the sheep owned by the said Wickersham, and which are

described in the mortgages of both plaintiffs and defendant bank." It is also stipulated that default had been made in the conditions of both mortgages; and that Test was cashier of the bank when its mortgage was taken, and witnessed the same. There are other facts stipulated, but, not deeming them necessary to the determination of the questions involved in this suit, we refrain from reciting them. The court entered judgment in favor of the plaintiffs for the possession of the mortgaged property and costs, it appearing from the record that possession of the sheep had been obtained by the plaintiffs theretofore by affidavit and an undertaking as provided by the Code in actions for claim and delivery. From this judgment, the defendant bank appealed.

AFFIRMED.

For appellant there was a brief over the names of *V. G. Cozad* and *Errett Hicks*, with an oral argument by *Mr. Hicks*.

For respondents there was a brief with oral arguments by *Mr. William Rufus King* and *Mr. William Henry Brooke*.

MR. JUSTICE HAILEY delivered the opinion of the court.

1. The defendant urges two questions only: "First, was there actual notice to the bank of the existence of plaintiffs' mortgage at the time of taking its own mortgage? and, second, if there was such notice, was it sufficient to cure the defect in the execution of plaintiff's mortgage," caused by the want of an acknowledgment thereto? As stated in the language of defendant's brief, "the notice to the cashier was given when one of the plaintiffs presented for collection the \$500 note described in plaintiffs' mortgage and told the cashier the plaintiffs had a mortgage on the sheep of Wickersham, the maker of the note," and it is admitted, in the agreed statement of facts, that the sheep referred to were those covered by the two mortgages. Defendant claims that this notice is not sufficient, in that "it does not appear to what this notice extended, nor does it appear that the other note described in the mortgage was mentioned." How actual notice of the mortgage could have been given more directly than by these admitted facts, we fail to see, unless by producing and exhibiting the

mortgage itself or reciting its contents. The notice clearly extended to the sheep upon which defendant afterwards took its mortgage, and had reference to the mortgage given thereon to plaintiffs, in which both notes secured thereby were mentioned. The cashier was told by one of the mortgagees of its existence, and could have learned from the same source its full terms, and such notice was sufficient: *Bohlman v. Coffin*, 4 Or. 313, 318; *Musgrove v. Bonser*, 5 Or. 313, 317 (20 Am. Rep. 737); *Manaudas v. Mann*, 14 Or. 450, 452 (13 Pac. 449); *Raymond v. Flavel*, 27 Or. 219, 241 (40 Pac. 158); *Crossen v. Oliver*, 37 Or. 514, 521 (61 Pac. 885). No question is raised that notice to the cashier was not notice to the bank in this case.

2. Section 5630, B. & C. Comp., provides:

"Any mortgage, deed of trust, conveyance or other instrument of writing intended to operate as a mortgage of personal property alone, or with real property, shall be executed, witnessed and acknowledged, or certified or proved, in the same manner as a conveyance of real property."

Section 5631, B. & C. Comp., provides:

"Any such mortgage * * may be recorded," etc.

The mortgage to plaintiffs, not having been acknowledged, was not entitled to record under the section last mentioned, which limits the right of record to such mortgages and other instruments mentioned in Section 5630 as "shall be executed, witnessed, and acknowledged, or certified or proved, in the same manner as a conveyance of real property." The mere record of such unacknowledged mortgage would, therefore, import no notice of its existence, and it must, therefore, be treated as an unrecorded mortgage: *Musgrove v. Bonser*, 5 Or. 313 316 (20 Am. Rep. 737); *Fleschner v. Sumpter*, 12 Or. 161, 167 (6 Pac. 506); *Walker v. Goldsmith*, 14 Or. 125 (12 Pac. 537); *Jones, Chat. Mort.* (4 ed.) § 248.

3. Defendant contends that plaintiffs' mortgage, not having been acknowledged in accordance with Section 5630, B. & C. Comp., is not within the terms of the recording act referred to (Section 5631), and that only such mortgages as are executed, witnessed and acknowledged, or certified or proved, in

the same manner as a conveyance of real property come within the terms of Section 5633, B. & C. Comp., which provides:

"Every mortgage, deed of trust, conveyance, or instrument of writing intended to operate as a mortgage of personal property, either alone or with real property, hereafter made, which shall not be accompanied with immediate delivery and followed by the actual and continual change of possession of the personal property mortgaged, or which shall not be recorded as provided in Section 5631, shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property, or any portion thereof."

In other words, it is contended that an unrecorded mortgage which does not strictly conform to the provisions of Section 5630, is void as to subsequent mortgagees and third parties, even though they take with notice of its existence. In support of this claim several cases are cited from other states, based upon statutes which were found upon examination to make no limitation upon the character of third persons against whom an unrecorded mortgage is declared void, and are radically different in that respect from our statute which expressly declares that such mortgages "shall be void as against subsequent purchasers and mortgagees in good faith and for a valuable consideration of the same personal property." The effect of this statute is to limit its operation to the classes mentioned, and clearly implies that such mortgage is valid as to all others without being recorded. In *Harms v. Silva*, 91 Cal. 639 (27 Pac. 1088), under a statute which provided that a mortgage was void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property, in good faith and for value, unless accompanied by a certain affidavit and acknowledgment, proved, certified and recorded in like manner as grants of real property, it was held that an unacknowledged chattel mortgage was valid as against a subsequent mortgagee of the same property who took with full knowledge of such prior mortgage, and that, having so taken, he was not an incumbrancer in good faith.

In *Mendenhall v. Kratz*, 14 Wash. 453 (44 Pac. 872), under a similar statute, a chattel mortgage, unaccompanied by the statutory affidavit, and unacknowledged and unrecorded in the county where the property was sold to defendant until after the sale, was held valid against a defendant who had knowledge of its existence at the time he purchased. In that case the court by ANDERS, J., said: "No one can become a purchaser or an incumbrancer of property in good faith, if he have notice of a pre-existing mortgage, although such mortgage may not be recorded or verified in accordance with the statute." To the same effect are *Roy v. Scott*, 11 Wash. 406 (39 Pac. 679), and *Darland v. Levins*, 1 Wash. 582 (20 Pac. 309). In the latter case, subsequent mortgagees and purchasers of a band of sheep, all of whom took with notice of a prior unrecorded mortgage thereon for the purchase price thereof, claimed that such prior mortgage was void as to them, but their claim was denied. This court has held in *Manaudas v. Mann*, 14 Or. 450 (13 Pac. 449), that an unacknowledged deed is valid between the parties and all others chargeable with actual notice, and in *Security Trust Co. v. Loewenberg*, 38 Or. 163 (62 Pac. 647), that an instrument affecting lands, "although not executed or acknowledged so as to make it a formal mortgage, is, nevertheless, effective between the parties and subsequent purchasers, or attaching creditors with notice." Considering our statutes regarding the conveyances of real property, which are similar in effect to those regarding chattel mortgages, we think the principle involved in the foregoing cases is the same as in the case at bar. The defendant, having had notice of the plaintiffs' mortgage prior to taking its own, had all the notice the record of such mortgage could afford, and should be bound by such notice. To hold otherwise would make laws intended to prevent fraud the very instruments of fraud: *Jackson v. Burgott*, 10 Johns. 462 (6 Am. Dec. 349). Recording acts are for the purpose of giving notice to those who have none, and thereby preventing wrong, and not for the purpose of giving undue advantage to those who have notice and thus enabling them to perpetrate wrong. The defendant, having notice, was not a mortgagee in good faith.

4. Under these circumstances the defendant could gain no advantage by recording its mortgage in Grant County after the removal of the sheep to that county, for Section 5632, B. & C. Comp., regulating the filing of mortgages in other counties to which the mortgaged property may be removed, applies the same test of good faith and valuable consideration to subsequent mortgagees in such counties as in the original county. The removal of the sheep to Grant County did not remove the defendant's knowledge of the plaintiff's mortgage thereon.

The judgment is affirmed.

AFFIRMED.

Argued 19 June, decided 26 June, 1906.

STATE v. JEWETT.

85 Pac. 994.

SUBORNATION OF PERJURY—SUFFICIENCY OF INDICTMENT AS TO MANNER OF COMMITTING THE CRIME.

1. An indictment for subornation of perjury is sufficient as to the manner of being sworn when it appears therein that the witness was "in due manner sworn," since that is equivalent to a charge that such witness was "duly sworn."

IDEM—CHARGE AS TO WHERE THE FALSE STATEMENT WAS PRESENTED.

2. An indictment charging the subornation of perjury by procuring a false oath to be made and setting out the entire paper, which is addressed to a certain public board, need not specifically charge that the oath was presented to any one, since the facts in that particular are apparent from the paper itself.

SAME—IDENTITY OF PERSON.

3. Where an indictment for subornation of perjury alleged to have been committed with reference to an application for the purchase of school lands charges that the applicant made her application to purchase the land described for her own benefit, and not for the purpose of speculation, that she had made no contract or agreement, express or implied, for the sale or disposal of the lands, and that the application, oath and jurat were of the following tenor, which are then set out in full, such allegations sufficiently show that the affidavit had reference to the application, that the person who signed the affidavit is the same person who signed the application, and that the lands described in the application are identical with those referred to in the affidavit.

SAME—CHARGING POWER TO RECEIVE AN OATH.

4. The State Land Board of this state being a board provided for by the constitution, it is not necessary that an indictment for suborning perjury before such board shall show that the board was duly constituted or had authority to consider the paper in which it is claimed the perjury was committed.

SAME—CHARGING THE PURPOSE OF THE FALSE OATH.

5. An indictment for subornation of perjury in connection with an application to purchase school lands alleged that when the applicant was (48th Or.—37)

sworn she did not intend to purchase the lands for her own benefit as she affirmed, but for the purpose of speculation, and had prior thereto contracted to sell the land to defendant, which contract was then in full force, and that defendant knowingly and willfully incited her to testify falsely "in the manner aforesaid for the purposes herein specified." The indictment also charged that defendant procured her to take her oath to the effect that she then and there made application to purchase the lands, and that it was necessary for her to make such oath in order to procure such school lands from the state, and that she acquired the lands from the state by means thereof for the purposes specified. *Held*, that such allegations were sufficient to show the purpose for which defendant procured the applicant to make, and for which she made the false oath and affidavit, and for which such affidavit was used.

SAME—CHARGING DETAILS OF FALSITY.

6. Where an indictment for subornation of perjury in connection with an application to purchase school lands alleges that at the time the applicant made the affidavit she did not intend to purchase the lands for her own benefit, but for speculation, and then had a contract to sell the lands to defendant, and that she well knew that her application was made for the purposes specified, the indictment is not objectionable in not alleging that the applicant had made a contract for the sale or disposal of the lands in case she was permitted to purchase, since the existence of the contract may be inferred from what is stated.

SAME—TERMS OF CONTRACT.

7. Under B. & C. Comp., § 1321, declaring that an indictment for subornation of perjury need not set forth the pleadings, record, or proceedings with which the oath is connected, an indictment for subornation of perjury alleged to have been committed in connection with an application to purchase school lands in which it was charged the applicant falsely stated under oath that she had no contract to sell or dispose of the lands, was not objectionable for failure to set out the terms of the alleged contract or the facts showing such contract.

SAME—KNOWLEDGE OF FALSITY.

8. Where an indictment for subornation of perjury in connection with an application to purchase certain school lands alleged that the applicant falsely, knowingly, and willingly swore that the proposed purchase was for her own benefit and not for speculation, and that she had made no contract for the sale of the lands, but that she at that time did not intend to purchase for her own benefit, and had a contract to sell to defendant, and knew that her application was made for such purpose, and that defendant knowingly procured her to testify falsely, and knew that she did not believe her testimony to be true, the indictment sufficiently alleged knowledge on the part of both parties.

CONSTRUCTION OF INDICTMENTS.

9. An indictment is sufficient if it contains all the necessary averments directly stated or by fair inference, and is not bad because such statements must be separated from superfluous matters inappropriately added.

From Marion: GEORGE H. BURNETT, Judge.

Statement by MR. JUSTICE HAILEY.

On April 28, 1905, the grand jury of Marion County, Oregon, returned the following indictment, omitting the formal parts, against the defendant:

"F. W. Jewett is accused by the grand jury in and for Marion County and State of Oregon, by this indictment, of the crime of subornation of perjury, committed as follows:

The said F. W. Jewett, on the 6th day of August, 1902, in the County of Marion and State of Oregon, then and there being, did then and there feloniously, willfully, knowingly and corruptly suborn, incite, instigate and procure one Emily A. Thatcher to appear in person before A. O. Condit, a notary public for the State of Oregon, to take her corporal oath before said notary public and upon her oath so taken to testify, depose and swear before said notary public in substance and effect that she, the said Emily A. Thatcher, then and there made application to purchase the following described school land, to wit: The northwest quarter of section 16, township 11 south, range 27 east of Willamette Meridian in Grant County, Oregon, containing one hundred and sixty acres; that the proposed purchase was made for the benefit of her, the said Emily Thatcher, and not for the purpose of speculation, and that she, the said Emily A. Thatcher, had made no contract or agreement, expressed or implied, for the sale or disposition of said aforescribed land, which said application, oath and jurat were then and are of the tenor following, to wit:

'APPLICATION TO PURCHASE.

To the State Land Board:

I hereby apply to purchase the following described school land, situated in Grant Conuty, Oregon, to wit: the northwest quarter of section 16, township 11 south, range 27 east of Willamette Meridian, all in township 11, range 27 east, containing 160 acres, and I agree to pay for the same according to law.

Emily A. Thatcher.

(Signature of Applicant.)

This 6th day of August, A. D., 1902.

State of Oregon, County of Marion—ss.

I, Emily A. Thatcher, being first duly sworn, say that I am over eighteen years of age; that I am a native born citizen of the United States; that the proposed purchase is for my own benefit and not for the purpose of speculation; that I have made no contract or agreement, express, or implied, for the sale or disposition of the land applied for in case I am permitted to purchase the same, and that there is no valid adverse claim thereto.

Emily A. Thatcher.

(Signature of Applicant.)

Subscribed and sworn to before me this 6th day of August, 1902.

A. O. Condit,

(Seal.)

Notary Public for Oregon.'

"And the said Emily A. Thatcher in consequence of and by means of said felonious, willful and corrupt subornation, incitement, procurement and instigation of the said defendant F. W. Jewett, on said 6th day of August, 1902, in said county and state, did then and there appear in person before the said A. O. Condit, a notary public for the State of Oregon, and then and there was in due manner sworn by the said A. O. Condit as such notary public, and then and there testified and took her oath before the said A. O. Condit as such notary public to the effect that the matters and facts set forth in said application and certificate were true; the said A. O. Condit then and there being a duly appointed, acting and qualified notary public of and for the State of Oregon and as such notary public then and there being competent and authorized by law to administer the said oath to her, the said Emily A. Thatcher, and the matter in which the said Emily A. Thatcher, was so sworn and took her oath as aforesaid before the said A. O. Condit as such notary public, as aforesaid, being then and there a matter in which a law of the State of Oregon then authorized an oath to be administered and then and there, at and upon the taking of the said oath by the said Emily A. Thatcher before said A. O. Condit, notary public, became and was a material matter and question under the laws of Oregon whether she, the said Emily A. Thatcher, was over eighteen years of age; a citizen of the United States; that the proposed purchase was for her, the said Emily A. Thatcher's own benefit and not for the purpose of speculation; whether she, the said Emily A. Thatcher, had made a contract or agreement, expressed or implied, for the sale or disposition of said land in case she, the said Emily A. Thatcher, was permitted to purchase the same and whether there was any valid adverse claim thereto, the same being then and there material and necessary in order to enable her, the said Emily A. Thatcher, to procure and acquire by purchase from the State of Oregon said aforescribed school lands, said school lands then and there being the property of and owned by the State of Oregon and subject to sale in the manner provided by law, and the said Emily A. Thatcher being so sworn as aforesaid, then and there, upon her corporal oath so taken as aforesaid, did feloniously, falsely, knowingly, willfully and corruptly depose, swear and testify, amongst other things, before said A. O. Condit, notary public, as aforesaid, in substance and effect that she, the said Emily A. Thatcher, proposed to purchase said aforescribed school lands for her, the said Emily A. Thatcher's own benefit and not for the purpose of speculation, and that she, the said Emily A. Thatcher had made no contract or agreement, expressed

or implied, for the sale or disposition of the aforescribed land so applied for in case she, the said Emily A. Thatcher, was permitted to purchase the same; whereas in truth and in fact the said Emily A. Thatcher, at said time when she was so sworn and took her oath before said A. O. Condit, notary public as aforesaid, did not intend to purchase said school lands from the said State of Oregon for her, the said Emily A. Thatcher's own benefit but for the purpose of speculation and had, prior thereto, made a contract for the sale and disposition of said land to F. W. Jewett, said contract then and there being in full force and effect, and by reason of said false, fraudulent, felonious and corrupt oath so taken by the said Emily A. Thatcher before the said A. O. Condit, as such notary public, she, the said Emily A. Thatcher, was thereby enabled to and did file said application with the clerk of the State Land Board of the State of Oregon and acquired by means thereof said lands from the State of Oregon for the purposes herein specified; and whereas in truth and in fact the said Emily A. Thatcher, at the time of making said application and taking her corporal oath before the said A. O. Condit, notary public as aforesaid, well knew that said application was made for the purposes herein specified; and whereas in truth and in fact the said F. W. Jewett then and there feloniously, knowingly, willfully and corruptly suborned, incited, instigated and procured the said Emily A. Thatcher to testify and depose falsely in the manner aforesaid for the purposes herein specified; and whereas in truth and in fact the said Emily A. Thatcher, at the time she was so sworn and took her oath and testified as aforesaid before the said A. O. Condit as such notary public, did not believe to be true the said matters so by her there testified, deposed and sworn as hereinbefore specified and whereas in truth and in fact the said defendant F. W. Jewett, at the time and place he so suborned, incited, instigated and procured the said Emily A. Thatcher to take her oath and to testify, depose and swear falsely as aforesaid, well knew that the said Emily A. Thatcher did not then and there believe to be true the said matters which he, the said defendant, F. W. Jewett, so then and there suborned, incited, instigated and procured her, the said Emily A. Thatcher, to testify, depose and swear before the said A. O. Condit, as aforesaid; and whereas in truth and in fact the said defendant, F. W. Jewett, did not then and there believe to be true the matters which he, the said defendant, F. W. Jewett, suborned, incited, instigated and procured the said Emily A. Thatcher to testify, depose and swear as hereinbefore specified, and the said defendant, F. W. Jewett, did in the manner and form aforesaid, feloniously, falsely, willfully and cor-

ruptly commit the crime of subornation of perjury, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

On January 4, 1906, the defendant demurred to this indictment, "for the reason that the facts stated therein do not constitute a crime," which demurrer was sustained by the lower court and the defendant discharged, and the state thereupon appealed to this court.

REVERSED.

For the State there was a brief over the names of *A. M. Crawford*, Attorney General; *J. H. McNary*, District Attorney, and *L. McNary*, with oral arguments by *Mr. John H. McNary* and *Mr. Charles L. McNary*.

For respondent there was a brief over the names of *Frederick Van Rensselaer Holman*, *William David Fenton* and *George Greenwood Bingham*, with oral arguments by *Mr. Holman* and *Mr. Fenton*.

MR. JUSTICE HAILEY delivered the opinion of the court.

The defendant was indicted for subornation of perjury in violation of Section 1875, B. & C. Comp., which provides:

"If any person authorized by any law of this state to take an oath or affirmation, or of whom an oath or affirmation shall be required by such law, shall willfully swear or affirm falsely in regard to any matter or thing concerning which such oath or affirmation is authorized or required, such person shall be deemed guilty of perjury, and if any person shall procure any other to commit the crime of perjury, such person shall be deemed guilty of subornation of perjury."

Section 1321, B. & C. Comp., provides:

"In an indictment for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court, or before whom, the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter in which the perjury is assigned; but the indictment need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed."

Under this last section it is sufficient if the indictment sets

forth, first, the substance of the matter in respect to which the crime is committed; second, before whom the oath alleged to be false was taken; third, that the person before whom it was taken had authority to administer it; and, fourth, proper allegations of the falsity of the matter on which the perjury is assigned. The defendant raises six specific objections to the sufficiency of the indictment in this case, which will be discussed in their order.

1. It is contended that the indictment does not allege that Emily A. Thatcher was duly sworn, and that the allegation "was in due manner sworn" is not sufficient, and is not equivalent to the expression "duly sworn." This contention is not tenable, for it is sufficient to charge that the person was duly sworn without setting forth the form or manner in which it was done: *State v. Spencer*, 6 Or. 153; 2 McClain, Crim. Law, § 874; 16 Ency. Pl. & Pr. 331. The words "in due manner" have the same meaning as the word "duly:" 3 Words & Phrases, 2259-2264; Anderson's Dict. Law, 385; 3 Century Dict. & Enc. 1795.

2. It is next claimed that the indictment does not allege that the application set out therein was made to the State Land Board of the State of Oregon, or that the affidavit had reference to that application, or that the person who signed the application is the same person who signed the affidavit, or that the lands described in the application are those referred to in the affidavit. The application is addressed to the State Land Board and is for the purchase of lands in Grant County, Oregon, and a copy of it is set out in the indictment. There is only one State Land Board in this state, and no board outside of the state has control of any of the state school lands within this state, so the application speaks for itself.

3. The indictment charges "that she, the said Emily A. Thatcher, then and there made application to purchase the following described school land, to wit," and then describes the lands set out in the application; that the proposed purchase was made for the benefit of her, the said Emily A. Thatcher, and not for the purpose of speculation, and that she, the said Emily A. Thatcher, had made no contract or agreement, express or

implied, for the sale or disposition of said ~~aforedescribed~~ ~~lands~~, which said application, oath and jurat were then ~~and~~ there and are of the tenor following, to wit, and then sets out the application and affidavit in full. These allegations are sufficient to show that the affidavit had reference to the application and that the Emily A. Thatcher mentioned in each was one and the same person, and that the lands described in the application are those referred to in the affidavit.

4. It is claimed that it should have been alleged in the indictment that the Oregon State Land Board was duly constituted as required by law and had authority or jurisdiction to consider or act upon the application of Emily A. Thatcher, and to allow her to acquire the lands. Under Section 5 of Article VIII of the Constitution of Oregon, the Governor, Secretary of State and State Treasurer constitute the board of commissioners for the sale of state lands, and are, therefore, a constitutional board, and we do not think it necessary, in a case of this kind, to allege that such board was duly constituted, or to specify its authority over state lands.

5. It is next contended that it is not alleged in the indictment that there was any agreement or understanding between Emily A. Thatcher and the defendant that the application, oath, testimony or affidavit was made to be used to purchase or acquire the land described in the indictment or any other land; nor that said oath or affidavit was so used; nor that the defendant procured her to commit perjury for the purpose of enabling her to purchase said land or any other land. The indictment alleges that at the time Emily A. Thatcher was sworn before the notary she did not intend to purchase said lands for her own benefit, but "for the purpose of speculation, and had, prior thereto, made a contract for the sale and disposition of said land to said Jewett, said contract then and there being in full force and effect," and that the defendant knowingly and willfully incited her to testify falsely "in the manner aforesaid for the purpose herein specified." It also alleges that the defendant procured her to take her oath to the effect that she "then and there made application to purchase" the lands mentioned in the indictment, and that

it was necessary for her to make the oath in order to enable her to procure and acquire from the state "the said aforedescribed school lands," and that she acquired by means thereof said lands from the State of Oregon for the purposes specified. This, we think, is a sufficient allegation of the facts showing the purpose for which defendant procured her to make and for which she made the false oath and affidavit and for which it was used. These allegations clearly show that at the time she made the oath she did so by agreement with defendant and at his instigation and to be used for the purpose of purchasing the lands from the State of Oregon, and that it was so used. In addition it is also alleged that the testimony alleged to be false was material, thus bringing the indictment within the two methods used for showing the materiality of the testimony alleged to be false in indictments for perjury, to wit: (1) To allege generally that the testimony in question was material, or (2) to allege in the indictment facts which render the materiality of the testimony clearly apparent: 16 Ency. Pl. & Pr. 343; 2 McClain, Crim. Law, §§ 878, 879.

6. Objection is made that there is no averment in the indictment that Emily A. Thatcher had made a contract for the sale or disposition of the lands in case she was permitted to purchase the same, and it is claimed that the indictment should set out the terms of any alleged contract or the facts showing such alleged contract. The first objection is fully answered by the allegations to the effect that at the time she made the affidavit she did not intend to purchase the lands for her own benefit but for the purpose of speculation, and then had a contract to sell them to defendant, and that she well knew that her application was made for the purpose specified.

7. As to the second objection, the statute (Section 1321, B. & C. Comp.), says "the indictment need not set forth the pleadings, record or proceedings with which the oath is connected," and we think it unnecessary, in a criminal action of this character, to allege the terms of the contract.

8. It is claimed that it is not alleged in the indictment that Emily A. Thatcher knew that any of the statements in her al-

leged oath were false, or that the respondent knew that any of the statements were false, or knew that she knew that they were false. The indictment alleges that she falsely, knowingly and willfully swore that the proposed purchase was for her own benefit, and not for the purpose of speculation, and that she had made no contract for the sale of the lands, and that at the time she so swore she did not intend to purchase for her own benefit, and then had a contract to sell to defendant, and that she knew her application was made for such purposes, and that the defendant knowingly procured her to testify falsely in the manner aforesaid, and knew that she did not believe her testimony to be true. These facts, we think, sufficiently alleged knowledge on the part of both parties, if such allegation is necessary under our statute: *State v. Ah Lee*, 18 Or. 542 (23 Pac. 424).

9. If the necessary averments appear in any form or may by fair construction be found anywhere within the text of the indictment, it is sufficient: *United States v. Howard* (D. C.) 132 Fed. 334. While the indictment in this case is unnecessarily incumbered by what one author has been pleased to call "immense masses of surplusage," yet we think it contains sufficient allegations to constitute the crime of subornation of perjury. It sets forth (1) the substance of the matter in respect to which the crime was committed; that is, the application to purchase school lands and the oath required therefor; (2) the name of the person before whom the oath was taken; (3) that he had authority to administer it; (4) proper allegations of the falsity of the testimony given before him and the materiality of the matter testified to; (5) proper charges of procurement on the part of the defendant, and those under Section 1321, B. & C. Comp., and No. 18 of the Forms of Indictments, 1 B. & C. Comp. p. 752 are sufficient to enable a person of common understanding to know what is intended: B. & C. Comp. §1314.

The judgment of the lower court will therefore be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

Argued 5 November, decided 11 December, 1906.

FIRST NATIONAL BANK v. MILLER.

87 Pac. 892.

APPEAL AND ERROR—BRIEFS—ASSIGNMENT OF ERROR.

1. Supreme Court Rule 32, subd. b (35 Or. 605), requiring appellant to serve a brief containing a concise statement of the errors on which he relies, is satisfied by a substantial compliance therewith.

SAME.

2. Where an assignment of errors in a brief stated that the court erred in giving, over objection and exception, certain instructions setting them out in distinct paragraphs containing but a small part of the entire charge, and not indicating the language complained of under separate assignments, the supreme court will not be so technical as to hold that if either of the parts of the charge so generally expressed correctly stated the law the entire assignment would be unavailing.

BEST EVIDENCE—WAIVER.

3. By admitting that a writing offered in evidence is a correct copy of a public record, the requirement of the original or a certified copy is waived.

POWER OF ATTORNEY—RIGHT OF REVOCATION.

4. Though a power of attorney expressly states that the appointment is irrevocable and confers power of substitution, it is not an estoppel on the grantor to revoke it unless the assignee has a material interest under the appointment.

AMBIGUITY—PAROL EVIDENCE.

5. A statement in an assignment of a judgment that the assignor appoints the grantee its irrevocable attorney with power of substitution creates a doubt as to the intent of the assignment, rendering the instrument ambiguous and tending to show that the transfer was made for some purpose without designing to vest an interest in the assignee, so that it is permissible for the assignor to testify what interest was intended to be conveyed.

From Malheur: **GEORGE E. DAVIS**, Judge.

Statement by **MR. JUSTICE MOORE**.

This is an action by the First National Bank of Payette, Idaho, a corporation, against William Miller, to recover money. The facts are that the defendant, who is an attorney at law, commenced an action in the circuit court of Malheur County for one Henry Helmick against one O. W. Porter, and on April 11, 1903, recovered therein the sum of \$2,930.22, including costs and disbursements. Sixteen days thereafter Helmick assigned the judgment to the plaintiff herein by an instrument appointing such corporation his irrevocable attorney with power of substitution, which transfer was immediately filed with the clerk of such court, and Miller notified thereof. Miller on June 29, 1903, collected the judgment, retained the sum of \$200

as his fees, and paid the remainder to the Moss Mercantile Company, Limited, pursuant to Helmick's direction, and conformable to a previous writing of which the following is a copy:

"Payette, Idaho, October 30, 1900.

Mr. O. W. Porter, you are hereby authorized and directed to pay over to Moss Mercantile Company, Limited, all moneys which you are now owing me. Henry Helmick."

This action was thereupon commenced, the complaint stating that Miller, as the attorney of the plaintiff herein, received to its use the sum of \$2,730.22, which, upon a demand therefor by it, he refused to pay, and praying for the recovery thereof with interest. Thereafter the Moss Mercantile Company commenced a suit against the bank to enjoin the maintenance of this action, and such proceedings were had that the suit was dismissed: *Moss Mercantile Co. v. First Nat. Bank*, 47 Or. 361 (82 Pac. 8, 2 L. R. A. (N. S.) 657.)

The answer herein denies the material allegations of the complaint, and avers that Miller paid out the money believing that the assignment of the judgment to the plaintiff herein was in the interest of the Moss Mercantile Company, to discharge the order hereinbefore mentioned. It is further alleged that the plaintiff herein took an assignment of the judgment without any consideration therefor, agreeing to collect the sum so awarded as Helmick's agent, without compensation for its service. The allegations of new matter in the answer were denied in the reply, and, the cause having been tried, judgment was rendered as prayed for in the complaint, from which Miller appeals.

REVERSED.

For appellant there was a brief over the names of *William Miller in pro. per.*, and *Richards & Haga*, with oral arguments by *Mr. James Heber Richards* and *Mr. O. O. Haga*.

For respondent there was a brief over the name of *King & Brooke*, with an oral argument by *Mr. William Rufus King*.

MR. JUSTICE MOORE delivered the opinion of the court.

At the threshold we are confronted with a motion to affirm

the judgment, on the ground that the errors relied on for a reversal are not specified with sufficient certainty, and that the bill of exceptions violates the provisions of the statute (B. & C. Comp. § 171), by including therein matters not necessary to an explanation of the alleged assignments of error. This cause having been tried at Pendleton, the appellant was required to serve a brief containing a concise statement of the errors on which he relied: Subd. b, rule 32 of the Supreme Court (35 Or. 587, 608). The assignments stated in Miller's brief are to the effect that the court erred in not permitting a certain witness to be cross-examined on matters within the issues, respecting which he had testified on his direct examination, setting out the questions asked. Seven other assignments in relation to the rejection of testimony and evidence are also noted in a similar manner. It is further stated in the brief mentioned that the court erred in giving certain instructions, setting out the exact language complained of, consisting of six paragraphs grouped under one heading of assignment, occupying two pages of the brief, and forming only a small part of the charge given. Four pages of the bill of exceptions are devoted to a history of the case of *Helmick v. Porter*, 22 to the rejection of testimony and evidence, and the remaining 23 to the court's statement of the issues involved, and the instructions deemed applicable thereto.

1. Reasonable latitude must be granted to counsel for the appellant in the statement of exceptions and in the preparation of a bill thereof, and because counsel for the adverse party or an appellate court might possibly condense the matters thus expressed, affords no valid reason for dismissing an appeal, where, as in the case at bar, there has been a substantial compliance with the provisions of the statute and of the rules of this court.

2. Where the assignment states that the court erred in giving, over objection and exception, certain instructions, setting them out in distinct paragraphs, containing only a very small part of the entire charge, and not indicating the language complained of under separate assignments, to hold that if either of the parts of the charge, so generally expressed, correctly stated

the law applicable to the case, the other assignments would be unavailing, would, in our opinion, be too technical. The motion to affirm the judgment will, therefore, be denied.

3. Considering the case on its merits, the bill of exceptions shows that one of the counsel for the plaintiff herein, having been called as Miller's witness, testified that Exhibit E, introduced in evidence in the case of *Moss Mercantile Co. v. First Nat. Bank*, 47 Or. 361 (82 Pac. 8, 2 L. R. A., N. S. 657), and published at page 32 in the brief of the defendant therein, was a correct copy of the original, which had been sent with the transcript of that cause on appeal to this court. Miller's counsel, referring to such original, thereupon inquired: "Do you know whether it has been returned or not?" An objection having been interposed, the witness replied: "I don't think it is material, and I decline to answer it." Q. "I just ask you if you know?" An objection to this question on the ground that it was incompetent, irrelevant and immaterial, having been sustained, no exception was taken to the action of the court in this respect. Thereafter Miller's counsel offered in evidence the copy of such exhibit that had been identified in the manner indicated. An objection to its admission on the ground, *inter alia*, that it was not the best evidence, having been sustained, an exception was allowed. The copy referred to is as follows:

"Payette, Idaho, April 27th, 1903.

Mr. Henry Helmick,

Payette, Idaho.

Dear Sir:

The assignment of the judgment against O. W. Porter in Malheur County, Or., for \$2775.00 and \$120 costs, we have entered for collection, proceeds of which when collected shall be subject to your order.

Yours truly

P. A. Devers, Cashier."

The bill of exceptions further discloses that the person writing that letter was the officer so represented of the plaintiff herein. The statute, regulating the admission of evidence, contains the following provision:

"The original writing shall be produced and proved except as provided in Section 703:" B. & C. Comp. § 771.

"There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases: (3) When the original is a record or other document in the custody of a public officer:" B. & C. Comp. § 703.

It will be remembered that the case of the *Moss Mercantile Company v. First Nat. Bank*, was a suit in equity, and, a final decree having been rendered therein, the judge trying the cause was required to identify all the exhibits (B. & C. Comp. § 827), and, an appeal having been taken on the merits, the transcript brought up such matters to this court, where, in cases of that kind, they thereafter remain, constituting a judicial record (B. & C. Comp. § 741), which could have been proved by the production of the original or by a copy thereof certified by the clerk of this court and attested by his official seal: B. & C. Comp. § 742. The object of requiring the production of a copy authenticated in this manner is to identify a document which is in the custody of a public officer, so that it may be received in evidence, and though a judicial record cannot, over objection and exception, be proved by parol (*Bowick v. Miller*, 21 Or. 25, 26 Pac. 861), such record can be established by a writing the identity of which is acknowledged without objection, as in the case at bar, by counsel for the adverse party who was authorized thus to speak for his client: 16 Cyc. 1024. The production of the best evidence, as stated in the objection to the admission of the letter referred to, was therefore waived.

4. The introduction of such evidence was also objected to on the further ground that it was irrelevant, incompetent and immaterial. It must be admitted that Helmick's assignment of the judgment to the plaintiff herein, without reservation or qualification, would have transferred to it, as between the parties hereto, all his right thereto. Though the assignment expressly appointed the bank Helmick's irrevocable attorney with power of substitution, the stipulation to that effect did not prevent him from rescinding such authority, unless it was coupled with an interest, independent of a compensation for the collection of the sum awarded: *Tiffany*, Agency, 157; *Frink v. Roe*, 70 Cal. 296 (11 Pac. 820); *MacGregor v. Gardner*, 14 Iowa,

326; *Blackstone v. Buttermore*, 53 Pa. 266. The letter which was offered in evidence having stated that the proceeds of the Porter judgment when collected should be subject to Helmick's order, the writing, if genuine, tended to show that the plaintiff herein had no interest in the money, except possibly an anticipated commission for its collection, which is not such a part thereof or claim thereto as to prevent a cancellation of the power before it had been executed, on the ground that the agent has an adequate remedy for the recovery of the damage sustained, for when the principal parts with his rights to the subject-matter before the agent has executed the power, it is in law a revocation of the authority: *Gilbert v. Holmes*, 64 Ill. 548. The letter was, therefore, material and competent, and an error was committed in excluding it.

5. A certified copy of the assignment of the judgment having been offered in evidence, Helmick, as a witness for the defendant herein, was asked: "What, if any, interest has the First National Bank of Payette, Idaho, in that judgment?" An objection on the ground that the question was incompetent, irrelevant and immaterial, and calling for the opinion of the witness on one of the issues of the case, having been sustained, an exception was allowed. As between the parties to an assignment of a chose in action, no consideration is necessary to its validity: *Dawson v. Pogue*, 18 Or. 94 (22 Pac. 637, 6 L. R. A. 176); *Gregoire v. Rourke*, 28 Or. 275 (42 Pac. 996). This rule rests upon the principle that a person who is *sui juris* may make such disposition of his property as he pleases, provided no person except himself is injured thereby. If the assignment executed by Helmick was intended absolutely to transfer his interest in the judgment to the bank, no necessity existed for a declaration in the instrument of any authority, irrevocable or for a limited period, to collect the money so awarded, for the right to do so would necessarily follow as an incident of the power conferred. The statement that the bank was appointed attorney, etc., casts a doubt upon the intent of the assignment rendering the instrument ambiguous, and tending to show that the transfer was made for some particular purpose without a design of vesting

in the assignee an interest in the judgment. This uncertainty in the instrument, evidencing the assignment, renders parol testimony admissible to explain the ambiguity, and as Helmick is the assignor, and presumed to be competent to state what interest he intended to transfer, if any, the court erred in not permitting him to answer the question asked.

It follows from these considerations that the judgment is reversed, and a new trial ordered. REVERSED.

Decided 18 December, 1906.

BAKER COUNTY v. HUNTINGTON.

87 Pac. 1036.

APPEAL—REVIEW—SUBSEQUENT APPEALS.

1. Questions decided on appeal become the law of the case, precluding a review thereof on subsequent appeals in the same litigation.

OFFICIAL BONDS—TEST OF VALIDITY.

2. The validity of an official bond is determined by the signatures thereto and not by the insertion of the names of the parties in the body of the instrument.

OFFICIAL BONDS—LIMITING LIABILITY OF SURETIES.

3. The liability of the sureties on a joint and several official bond is not affected as to the obligee by any memoranda opposite the signatures, as, "For \$1,000;" the responsibility being fixed by the terms of the promise.

TRIAL—INSTRUCTION NOT ASSUMING FACTS.

4. In an action on a tax collector's bond, an instruction that the mere signing by the sureties of an uncompleted instrument and leaving it with the collector, without any express restrictions as to its delivery, is not enough, as a matter of law, to show authority to deliver it, but it is an important fact, "if you find it to be a fact," to be considered, etc., does not assume that it had been proven that the defendants left the bond with the collector without restriction as to delivery.

APPEAL—HARMLESS ERROR—CONSTRUCTION OF CONTRACT BY JURY.

5. Under B. & C. Comp., § 136, making it incumbent on a court to interpret written instruments, error in submitting them to the jury is harmless if their finding thereon is correct.

TRIAL—INSTRUCTIONS—UNDUE EMPHASIS.

6. The use of the word "important" in referring to certain matters proper for the consideration of a jury will not be considered as placing undue stress on those matters where the word is used several times, and in the instructions submitted for both parties.

TRIAL—NEED OF ASKING PARTICULAR INSTRUCTIONS.

7. Where particular instructions are desired on special points, they must be requested or error cannot be assigned on the failure to so charge.

For instance: That instructions as to certain restrictions and reservations claimed to have been made in connection with the delivery of a bond in suit were confined to the time of delivery is not a subject for comment. (48th Or.—38)

plaint by the defendants, where they did not request that prior conversations be included in that portion of the charge.

SCOPE OF BILL OF EXCEPTIONS—TRANSCRIPT OF EVIDENCE.

8. An appeal in a law case must be tried on the bill of exceptions, and objections must be based on the record certified in that form—the fact that a transcript of all the testimony is attached to the bill does not enlarge the scope of the latter. The only purpose for which such an exhibit can be used is to enable the court to determine whether a motion for a nonsuit or a directed verdict should have been allowed.

APPEAL—PRESUMPTION AS TO BASIS FOR INSTRUCTION.

9. An instruction will always be presumed to have been based on evidence where the bill of exceptions does not purport to contain all the testimony, and it does not appear by the record that no testimony was offered on that point.

INTEREST ON UNSETTLED SUM BEFORE JUDGMENT.

10. Under Section 4595, B. & C. Comp., allowing interest on moneys after the same become due, interest cannot be allowed on a disputed claim until judgment is rendered, whether the dispute be as to the fact of liability or only as to the amount.

For instance: Where the sureties on a sheriff's bond controverted their liability for his default, though acknowledging the extent of his defalcation, interest is not allowable in the demand against them until its liquidation by judgment.

COSTS ON APPEAL—DISCRETION.

11. Under Section 566, B. & C. Comp., the supreme court may, in its discretion, allow either party its costs or disbursements, whether such party wins or loses.

From Umatilla: WILLIAM R. ELLIS, Judge.

Action on a sheriff's bond as tax collector by Baker County against A. H. Huntington and others. There was a judgment for plaintiff, and several defendants appeal. **AFFIRMED.**

For appellants there was a brief and an oral argument by *Mr. James Henry Raley*.

For respondent there was a brief with oral arguments by *Mr. Leroy Lomax* and *Mr. Gustav Anderson*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is the third appeal by the defendants, A. L. Brown, D. Cartwright, J. T. Fyfer, James Fleetwood, and J. W. Isenhofer, from a judgment rendered against them in an action upon an instrument alleged to be a sheriff's bond as tax collector.

1. As grounds for a reversal of the judgment, it is contended that errors were committed in refusing to take from the jury the undertaking which forms the basis of this action; in refusing to give a judgment of nonsuit; and in declining to instruct the jury

as requested to return a verdict for the defendants. These alleged assignments of error are founded on the assumption that the testimony introduced by the plaintiff was insufficient to show that Huntington, as sheriff of Baker County, ever had any authority from the defendants, as sureties on the bond, to deliver that instrument to the county court of that county. The legal principles so insisted upon were presented to, and considered by, this court on the former appeals (46 Or. 275, 79 Pac. 187, and 47 Or. 328, 83 Pac. 532), and the conclusions there reached have become the law of the case, precluding a review of the questions suggested: *Applegate v. Dowell*, 17 Or. 299 (20 Pac. 429); *Portland Trust Co. v. Coulter*, 23 Or. 131 (31 Pac. 280); *Stager v. Troy Laundry Co.* 41 Or. 141 (68 Pac. 405); *Pacific Biscuit Co. v. Dugger*, 42 Or. 513 (70 Pac. 523).

An exception having been taken to the following part of the court's charge, it is maintained that an error was committed in giving it, viz.:

"(3) I instruct you that, as a matter of law, the lack of names of the principal and sureties in the body of the bond, lack of justification by two of the sureties, minutes or entries opposite the names of the sureties who signed, and failure of the principal to sign the bond, are not fatal defects, and do not, of themselves alone, render the bond void. The effect of these was to put the county upon inquiry, at the time Huntington offered the bond, as to Huntington's authority to deliver the same as a completed obligation for the purpose claimed by the plaintiff, and the plaintiff will be held bound by any facts which you find it would then have ascertained by reasonable inquiry and investigation."

To render the instruction complained of intelligible, it is deemed proper to set out a copy of the bond, which, omitting the justification of the sureties thereon, is as follows:

"State of Oregon, County of Baker. ss.

"Whereas, at an election held on the 4 day of June, 1900, A. H. Huntington was duly elected sheriff of the County of Baker, State of Oregon, we, A. L. Brown,

and

_____ hereby undertake that if the said
A. H. Huntington shall not pay over according to law all money

that may come into his hands by virtue of such office and otherwise well and faithfully perform the duties of such office, that we, or either of us will pay to the State of Oregon, the sum of ten thousand dollars.

For \$ 1000.00	A. L. Brown.	(Seal).
" \$ 2000.00	James Fleetwood.	(Seal).
" \$ 1000.00	D. Cartwright.	(Seal).
\$ 1000.00	Harry A. Duffy.	(Seal).
1000.00	J. T. Fyfer.	(Seal).
1000.00	J. W. Isenhofer.	(Seal)."

2. As evidence of the ability of the sureties to perform the undertaking, and as to the surrender of the instrument, we take the following excerpt from a former opinion: "It appears from accompanying certificates that Duffy, Fyfer, Cartwright and Isenhofer justified, but not so with Fleetwood and Brown. It is alleged that Huntington delivered the writing obligatory to the County Court of Baker County as and for his additional bond as sheriff and *ex officio* tax collector of that county, and that the same was accepted by the court:" 46 Or. 275 (79 Pac. 187). Considering the clauses of the instruction in the order stated, it is the signatures of the obligors to the bond, and not the insertion of their names in the body thereof, that give validity to the instrument and render them liable for a breach of its conditions: 5 Cyc. 732 and 739; Murfree, Official Bonds, § 168. The statute, requiring the execution of a supplemental undertaking, is as follows:

"Before entering upon his duty as tax collector, the sheriff shall give a bond, signed by some responsible surety company, or some responsible surety or sureties as approved by the county court, conditioned for the faithful performance of his duties as such tax collector, in such amount as the county court shall direct, and such bond if signed by a surety company shall be paid for by the county court:" B. & C. Comp. § 3094.

The legislative assembly has not demanded that the sureties to the bond of a sheriff as tax collector should justify, and, in the absence of an enactment to that effect, the signatures of the obligors without evidence of their qualifications validates the instrument, if it is approved by the county court: *Du Boise v. Bloom*, 38 Iowa, 512.

3. An examination of the bond hereinbefore set out will show that preceding the name of A. L. Brown appear the word and figures, "For \$1,000.00," and that similar memoranda are prefixed to the names of the other obligors, which words and figures are designated by the court as "minutes or entries." What such word and figures may mean is unimportant, so far as the plaintiff is concerned, for the bond on its face being joint and several, the prefixing to the names of the sureties of the minutes or entries adverted to cannot limit or alter their liability which is fixed by the terms of the instrument: *Dangel v. Levy*, 1 Idaho, 722. It has been held that the failure of a principal to sign a bond when his name appears in that capacity on the face of the instrument relieved the sureties from liability thereon for a delivery and acceptance thereof without their knowledge and consent: *Johnson v. Kimball Township*, 39 Mich. 187 (33 Am. Rep. 372); *Hall v. Parker*, 39 Mich. 287. In the case at bar, though the bond on its face states that Huntington was duly elected sheriff, etc., he is not designated therein as principal, and, as the only person named as a party is A. L. Brown, who signed the instrument, no notice on that account could have been imparted to the plaintiff of any failure to execute the undertaking.

As the other parts of the instruction complained of state the defendant's theory of the case they will not be considered, believing that no error was committed as alleged.

4. Exceptions having been taken to the following parts of the charge, it is contended that errors were committed in instructing the jury as follows:

"(5) It is not necessary for the plaintiff to show express authority from the defendants to Huntington to deliver the bond. Huntington's authority may be implied from the acts and conduct of the sureties. The mere signing by them of the uncompleted and imperfect instrument in the manner in which they signed it, and leaving it with Huntington without any express restriction as to its delivery, is not enough, as a matter of law, to show authority to deliver it, but it is an important fact, if you find it to be a fact, to be considered by you along with all the other evidence in determining whether the sureties intended to vest Huntington with authority to deliver the instrument in its

then condition as their act and deed, or whether the understanding was that the bond should not be delivered until the aggregate amounts assumed by the several sureties should equal the face of the bond.

"(6) The uncompleted condition of the instrument in the particulars to which I have referred, although in itself not a fatal defect, should be considered, as also should the attempt to limit the liability of the sureties, by writing the amount each intended to assume, if you find that the figures were placed there by the sureties or at their direction for any such purpose, opposite the signatures. If you are satisfied from the evidence that the defendants wrote or caused to be written these figures opposite their signatures in an attempt thereby to limit their liability, you should consider that fact. All these are important factors and should be considered. And if, at the time they executed the bond, they imposed no restrictions upon its delivery, and nothing was said about that matter or the obtaining of other sureties, this is an important fact for your consideration as evidence, although not conclusive of an intent to make Huntington their agent to deliver the bond to the county. Huntington's authority must be determined from all the circumstances in the case, and not from any single item of evidence."

It is argued that the fifth instruction assumed that it had been proven that the defendants left the bond with the sheriff without express restriction as to its delivery, thereby excluding a consideration of any reservation that might have been implied from the face of the instrument, the acts, conduct or conversation of the sureties, thus leading the jury to conclude that any evidence, other than an express limitation, was ineffectual. It is unnecessary to state whether or not there was any testimony introduced at the trial tending to warrant the court's declaration to the effect that the bond was left with Huntington "without any express restrictions as to its delivery," for the language so used is qualified by the further remark addressed to the jury, "if you find it to be a fact." The jury were thereby told that if they should find that the instrument was left with the sheriff without any express restrictions as to its delivery, such fact should be considered along with other evidence, such as the face of the instrument, the acts, conduct or conversation of the defendants, in determining whether or not they intended to authorize Huntington to deliver the bond in its then condition.

5. It is maintained that in referring to the bond and to the prefixing to the defendants' names the words, signs, etc., noted thereon as possibly evidencing an intention to limit their liability, the court, in the sixth instruction, told the jury that if they found that the figures placed there by the sureties, or at their direction, for any such purpose, etc., thereby submitted to them the interpretation of a writing which it should have construed; that the figures mentioned may have been so placed by some person other than the sureties, or without their direction; and that undue attention is called to and improper stress laid upon what is designated as an "important" fact, thus confining the limitation of restrictions to the time when the bond was executed and excluding from consideration all conversations the defendants may have had in respect to their liability prior to their signing the instrument. It is incumbent upon a court to interpret written instruments (B. & C. Comp. § 136), but where the construction of a document is referred to a jury, their finding thereon, if correct, renders the errors committed in such submission harmless: *Johnson v. Shively*, 9 Or. 333; *Christenson v. Nelson*, 38 Or. 473 (63 Pac. 648). In the case at bar, we believe the finding on the question involved in the instruction under consideration is correct, so that, if it be assumed that the matter should not have been submitted to the jury, their verdict will not be disturbed. It is possible that the word, signs and figures prefixed to the signatures of the sureties may not have been written by them, or with their direction, but if such be the case, the entries must, to have any effect as a limitation, have been made on the instrument prior to the signing, for, upon subscribing their names thereto, the sureties adopted such minutes as their own, so that the writing referred to, however made, comes within the terms of the charge.

6. The word "important," as used by the court to qualify the word "fact," was probably not well chosen, but as the same adjective is employed in limiting words in other parts of the charge that are favorable to the defendants, we do not think they were prejudiced, or the jury misled thereby.

7. It is unnecessary to consider whether or not the restric-

tions in respect to the delivery of the bond were confined to the time when the instrument was executed, for, if the defendants desired that prior conversations should have been included in that part of the charge, they should have requested an instruction to that effect, but, not having done so, we think no prejudicial error was committed in giving the fifth and sixth instructions.

8. Exceptions having been taken to the following parts of the charge, it is insisted that the court erred in giving them, to wit:

"(13) You are instructed that the sureties on the sheriff's official bond as tax collector are, equally with the sheriff, civilly liable for the acts of his deputies, and that it is immaterial in this case how the shortage arose or by whom it was created, or whether or not it arose from criminality or accident. These matters are not to be considered by you in this case.

"(14) It is admitted by the defendants in this cause, Brown, Fleetwood, Cartwright, Isenhofer and Fyfer, that the shortage in the account of A. H. Huntington, as sheriff, for taxes collected by him between September 5, 1900, and July 7, 1902, is \$10,770.64, but the penal sum named in the bond is only \$10,000. I instruct you that the said sum of \$10,000 is the maximum amount of penalty that can be recovered by the plaintiff in this action against said defendants. If, therefore, you find for the plaintiff, your verdict against defendants should be for the sum of \$10,000, with interest thereon at the legal rate from the date of the service of summons in this case on the defendants, to wit, the 12th day of March, 1903."

It is argued by defendant's counsel that no testimony was offered tending to show that the shortage of money adverted to was occasioned by any deputy sheriff, and for that reason the thirteenth instruction was erroneous. The bill of exceptions certified to by the judge does not purport to contain all the testimony given at the trial, nor is any statement made therein that no testimony was offered tending to show what caused the loss of the taxes collected. The court reporter, however, certifies to what purports to be a transcript of all the testimony so introduced, which copy is referred to and identified in the court's certificate; but as the transcript was evidently sent up in support of the defendants' motions for a judgment of nonsuit, and for an instruction to the jury to return a verdict in their favor, it

should be examined for those purposes only. If a transcript of all the testimony, etc., could take the place of a bill of exceptions, there would be no necessity for preparing a formal statement in writing of the objections and exceptions taken by a party during the trial of a cause, with so much of the testimony only as illustrated the error alleged to have been committed, for by interposing a motion for a judgment of nonsuit, or for an instruction to return a verdict for the defendant, the entire testimony must be examined upon every ground that could be suggested, the work of a court of appeals would become almost interminable.

9. The bill of exceptions not containing the statements mentioned, it must be presumed that the instruction complained of was based on the testimony introduced, and hence no error was committed in giving it.

The fourteenth instruction limited the recovery to the penal sum specified in the bond, in case the jury found that plaintiff was entitled to recover, and in our opinion it correctly stated the law applicable to the case.

An exception having been taken to the following part of the charge, it is claimed that an error was committed in giving it, viz.:

"(16) I instruct you that, as a matter of law, a person who signs a joint and several bond or obligation in which a specific penal sum is named, cannot lessen or limit his liability thereon by writing another and smaller sum opposite his signature. If liable at all on the instrument he can be held for the full amount, notwithstanding such figures. If he desires to limit or lessen his liability he must insert appropriate words in the body of the instrument. But you may consider such sums written in front of the names in determining whether or not any restriction or limitations were placed upon the delivery of the bond; provided you further find that defendants wrote the sums opposite their names or authorized it to be done at the time of signing."

If the limit of the liability of a surety had been stated in the body of the bond, the sum so specified would have been notice thereof to the obligee, and probably constituted the measure of recovery against each: *People v. Stacy*, 74 Cal. 373 (16 Pac. 192). Prefixing numbers to the names of sureties on a joint

and several bond, however, could not change the legal effect of the instrument or limit the liability of the persons whose names were so subscribed to the sums indicated: *Dangel v. Levy*, 1 Idaho, 722. No error was committed in giving this instruction.

The defendants' counsel requested the court to give the following instruction, which was modified by inserting the words indicated in parenthesis, and, an exception having been saved, it is maintained that an error was committed, to wit:

"(17) I instruct you that the signing of the instrument in evidence by the defendants, and the delivery thereof to Huntington, if you find they did so, did not authorize Huntington to deliver it to the county court of Baker County; and unless you further find from the evidence that the defendants, either by word or act, waived the limitation and restrictions (if any), expressed upon the face of the instrument, such delivery, if any, by Huntington was unauthorized, and your verdict must be for the defendants."

It is argued that the insertion of the words "if any" in the instruction requested submitted to the jury the determination of the question whether or not the word, signs, and figures prefixed to the names of the sureties, constituted a limitation upon the instrument, when the duty of construing the language of the writing devolved upon the court. If it be assumed that the interpretation of the prefixes to the names of the sureties was erroneously submitted to the jury, we believe their finding thereon was correct, and that the verdict should not be set aside: *Johnson v. Shively*, 9 Or. 333; *Christenson v. Nelson*, 38 Or. 473 (63 Pac. 648).

It follows from these considerations that the judgment should be affirmed, and it is so ordered. AFFIRMED.

MR. JUSTICE HAILEY, having been of counsel, took no part herein.

Decided 19 March, 1907.

ON MOTION FOR REHEARING.

MR. JUSTICE MOORE delivered the opinion.

10. The defendants' counsel having filed a petition for a rehearing, call particular attention to that part of instruction No.

14 pursuant to which a verdict was returned, and judgment rendered for interest on the sum specified in the undertaking, from March 12, 1903, when the summons was served, to June 19, 1906, when the recovery was had. The counsel for the respective parties stipulated, March 31, 1903, that during the term for which the defendants were sureties on the bond of the sheriff as tax collector, that officer received, failed to account for and converted to his own use the sum of \$10,770.64. This agreement was in the nature of an acknowledgment of the extent of the sheriff's defalcation, but it was not an admission of their liability for any part thereof. The statute regulating the compensation to be paid for the use of money is, so far as applicable, as follows:

"The rate of interest in this state shall be 6 per centum per annum, and no more, on all moneys after the same become due:" B. & C. Comp. § 4595.

When the right to recover in an action is in good faith denied, interest will not be allowed on the demand prior to its liquidation by judgment: 22 Cyc. 1515; *Sorenson v. Oregon Power Co.* 47 Or. 24 (82 Pac. 10). That the defendants in good faith controverted their liability is evidenced by the several appeals which they have prosecuted, and this being so, the sum due was not liquidated as to them until June 19, 1906, when the last judgment was rendered. There is no dispute as to the time for which interest was awarded. ~~But~~ If within 10 days the plaintiff remits all interest prior to the rendition of the judgment, the cause will be remanded to the court below, with directions to enter a judgment for the sum of \$10,000, with interest from June 19, 1906, at the rate of 6 per cent per annum; but if this reduction is not made within the time specified, the judgment will be reversed, and a new trial ordered: *Graham v. Merchant*, 43 Or. 294 (72 Pac. 1088).

11. The defendants will be allowed their costs and disbursements in this court upon the appeal.

AFFIRMED: REHEARING DENIED.

Argued 10 October, decided 18 December, 1906.

WHITE v. SAVAGE.

87 Pac. 1040.

BILLS AND NOTES—ACCOMMODATION PARTY—NOTICE—STATUTES.

1. Under the express provisions of Section 4431, B. & C. Comp., the holder of a note for value is entitled to recover thereon against an accommodation party, though the holder had notice at the time he took the note that the person sought to be charged was only an accommodation party.

PRINCIPAL AND SURETY—FAILURE TO PURSUE PRINCIPAL DEBTOR.

2. Failure of a creditor to proceed against the principal debtor on the request of the surety does not release the surety from liability.

INJUNCTION—ADEQUATE REMEDY AT LAW.

3. Where a husband signed certain notes for the accommodation of his wife, who thereafter died, leaving an estate sufficient to pay them, the husband is not entitled to an injunction restraining the holder from pursuing him, instead of filing the notes as a claim against the wife's estate; the husband having an adequate remedy at law by himself paying the notes to the holder and filing them against the wife's estate.

From Marion: WILLIAM GALLOWAY, Judge.

Suit for an injunction by M. M. White against Lewis Savage and others, resulting in a decree for plaintiff, from which the defendants appeal.

REVERSED.

Statement by MR. JUSTICE HAILEY.

This is a suit to restrain defendant Savage from prosecuting two actions against the plaintiff upon promissory notes, signed by plaintiff and his wife, since deceased, and to compel the defendant Savage to present his notes to the executors of the will of plaintiff's wife for allowance, and for said executors to allow and pay them out of the estate. The amended complaint alleges in substance, that the defendant Savage is the father of the defendant Zella Fletcher, and H. C. Fletcher is her husband; that Carolina E. Sloper White, wife of the plaintiff, died about August 18, 1904, in Marion County, Oregon, and by her last will appointed the defendants H. C. and Zella Fletcher executor and executrix, respectively, of her will, which was thereafter admitted to probate and said executor and executrix duly appointed and qualified thereunder; that defendants George Sloper and Lottie Young are the only children and sole heirs at law of the plaintiff's wife; that plaintiff and said Carolina E. Sloper White were married about the month of August, 1901, and were husband and wife at the time of her death; that the plaintiff is also

named as a legatee and devisee in her will, but has renounced his claim to the provisions of said will, and claims a life estate in all her lands as tenant by curtesy; that for several years preceding her death his wife was an invalid and required great care and attention in nursing, and they were without any considerable means to pay for such expenses, and his wife applied to the defendant Savage for a loan, and Savage from time to time did advance and lend her divers small sums of money, which were wholly used in defraying expenses of nursing and caring for her, and that from time to time, as the sums loaned amounted to the sum of \$100, plaintiff's wife executed notes to Savage as an evidence of said indebtedness on her part, and plaintiff signed the notes with her, but only as surety; that on August 22, 1904, after her death, Savage commenced an action in the circuit court of Marion County against the plaintiff on two of said notes for \$100 each, and thereafter, on September 6, 1904, commenced another action in the same court against the plaintiff upon the remaining two of said \$100 notes, and in each of said actions caused a writ of attachment to be issued, and by virtue thereof attached the plaintiff's estate by curtesy in the lands of his deceased wife, and that Savage has not presented said claims to the executors for allowance, and wrongfully fails to present the same, for the purpose of defrauding plaintiff out of his life estate in the lands of his wife; that all the moneys paid by Savage as a consideration for the execution of the four notes, and also a note for \$300, dated January 21, 1903, due six months after date, in favor of Savage, and signed by the plaintiff and his wife, and secured by a mortgage upon lands owned by her in Salem, Oregon, were received wholly by the plaintiff's wife and expended for her care and nursing and medical attendance upon her, and that the plaintiff received no part of the consideration for said notes, and is only a surety upon said notes, and the same is well known to the defendant Savage.

It is further alleged that shortly after the death of plaintiff's wife the defendant Savage offered to pay him \$100 for a deed of conveyance to him of plaintiff's estate and interest in the lands owned by his wife at the time of her death, but the sum was

wholly inadequate, and plaintiff declined to execute such deed, and thereupon Savage commenced the action above referred to, and now the five defendants are engaged in an effort to despoil the plaintiff and obtain his interest in his wife's lands by selling the same upon execution upon the judgments to be obtained in said actions; that said actions have been commenced solely for that purpose, and the plaintiff, aside from his estate in said lands, is wholly insolvent, and that Savage knew when he brought his actions that the debt could be satisfied and the judgment obtained by him only out of the life estate of plaintiff, and he also knew that the estate of plaintiff's wife was well able to pay the same, and that it would pay it upon presentation; that prior to the commencement of this suit plaintiff duly presented his claim and demand to the executor and executrix of said estate, setting forth, among other things, the fact that he was only surety upon said notes, and demanding that said executor and executrix indemnify and save him harmless of and from the amounts due upon said notes, but they have failed and neglected so to indemnify and save him harmless, notwithstanding the fact that the estate of plaintiff's wife is able to pay the same after the payment of all the prior claims against said estate; that plaintiff has no plain, speedy or adequate remedy at law, and that the plaintiff has offered to defendant Savage payment in full upon all said notes and mortgage, and requested Savage to assign same to plaintiff, but defendant has refused to do so for the reason that, if he did so, his prospects of acquiring title to said property from the said several actions would be entirely swept away, and that being his only reason for bringing said actions at this time; and that, unless defendant Savage is so restrained, he will recover judgment and sell plaintiff's estate and thereby cause him irreparable damage. Plaintiff then prays for a decree restraining defendant Savage from further prosecuting his actions, and declaring plaintiff to be a surety only upon said notes, and that Savage be required to present his notes to the executors of the estate of plaintiff's wife immediately, and that said executors be required to pay all of said notes out of the assets of said estate and indemnify and save the plaintiff harm-

less from all liability for all said notes and exonerate him as surety thereon. The foregoing is the substance of the complaint and substantially the language of the pleader. To this complaint a demurrer was filed on the grounds that the court had no jurisdiction of the subject-matter and that it did not state facts sufficient to constitute a cause of suit, which demurrer was overruled and answers filed, and, after trial, a decree was rendered in favor of the plaintiff, from which this appeal was taken.

REVERSED.

For appellants there was a brief over the names of *John W. Reynolds* and *B. F. Bonham*, with oral arguments by *Mr. Reynolds* and *Mr. Carey F. Martin*.

For respondent there was a brief over the names of *Carson & Cannon* and *Richardson & Richardson*, with oral arguments by *Mr. John A. Carson* and *Mr. Samuel T. Richardson*.

MR. JUSTICE HAILEY delivered the opinion of the court.

1. The facts alleged in the foregoing complaint are evidently intended to state a cause of suit to compel the creditor Savage to proceed against the estate of plaintiff's wife as principal upon the notes in controversy, for payment therefor, before coming against the plaintiff as surety thereon. This is not a case where the plaintiff as surety claims to have been discharged in full or *pro tanto* by some act of the creditor detrimental to his rights as surety, as are the cases of *Brown v. Rathburn*, 10 Or. 158, and *Hoffman v. Habighorst*, 38 Or. 261 (63 Pac. 610). It is claimed that, the plaintiff being surety only upon the notes signed by himself and wife, and defendant Savage being aware of that fact, he cannot compel plaintiff to pay without first exhausting his remedies against the principal or her representatives. Section 4431, B. & C. Comp., provides as follows:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or endorser, without receiving value therefor, and with the purpose of lending his name to some other person. Such a person is liable on the instrument to the holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

Under this section it is clear that, so far as a holder for value is concerned, the question of notice does not affect the liability of the surety, and the complaint in this case shows that Savage is a holder for value; for it expressly alleges that he advanced and loaned to the plaintiff's wife money for which the notes were given.

2. It has been held by this court in *Findley v. Hill*, 8 Or. 248 (34 Am. Rep. 578), that the failure of the creditor to proceed against the principal debtor upon the request of the surety does not release the surety from liability; and in *Rockwell v. Portland Sav. Bank*, 39 Or. 241, 244 (64 Pac. 389), it is said: "In such case the surety may protect himself by paying the debt and being subrogated to the rights of the creditor." In *Bowen v. Clarke*, 25 Or. 592, 595 (37 Pac. 75), Mr. Justice BRAN said: "We understand the rule to be that where two or more persons execute an instrument at the same time, upon the same consideration, and for the same purpose, they are all, in legal effect, joint contractors or obligors, so far as their liability to the other contracting party is concerned, although one may be designated thereon as surety, and sign it as such." And in *Galloway v. Bartholomew*, 44 Or. 75, 77 (74 Pac. 467), it was held that the word "surety," written after the name of one of the makers of a note, would only show the relation of the makers to each other, and perhaps charge the holder with knowledge to that effect, but it would not affect their liability to him.

3. In *Harman v. Harman*, 62 Neb. 452 (87 N. W. 177), it is held that a surety of a decedent who pays a claim against the estate of his principal is subrogated to the rights of the creditor. The rule is well established in this state that a surety who pays the debt of his principal is subrogated to the rights of the creditor: *Keel v. Levy*, 19 Or. 450-454 (24 Pac. 253); *Denny v. Seeley*, 34 Or. 364-369, 370 (55 Pac. 976); *Hoffman v. Habighorst*, 38 Or. 261-271 (63 Pac. 610). In *Scantlin v. Kemp*, 34 Tex. 338, a note was given to the plaintiff Scantlin, signed by defendants Kemp and another as surety, and by Slane, the principal maker, who died, and after an administrator had been appointed the holder sued the sureties, who answered and proved

upon trial that Slane was the principal and received the entire consideration of the note, and they were sureties only, and that Slane left a solvent estate and they had notified the holder to take the proper steps to collect his claim from the estate, and a judgment was thereupon entered in favor of the sureties, but the case was appealed and the supreme court in deciding it held that on the death of the principal the sureties became primarily liable for the note, and that it was unnecessary to present the note to the administrator for allowance: *Willis v. Chowning*, 90 Tex. 621 (40 S. W. 395, 59 Am. St. Rep. 842); *Vredenburg v. Snyder*, 6 Iowa, 39; *Ray v. Brenner*, 12 Kan. 105.

In the case at bar, however, it is not alleged or claimed that the plaintiff requested the defendant Savage to present his claim to the executors of his wife's will for allowance, but that plaintiff presented his claim to the executors and requested them to protect him. We think, however, that he should have paid the notes to Savage and then presented his claims to the executor and executrix of his wife's estate, and that he could have fully protected himself by so doing. Having, therefore, a complete remedy at law whereby he could protect his rights, the court had no jurisdiction of this case, and the demurrer should have been sustained.

The decree is therefore reversed, and the case remanded for further proceedings not inconsistent with this opinion.

REVERSED.

Decided 18 December, 1906.

SPRAGUE v. SCHOTTE.

87 Pac. 1046.

VALIDITY OF CONTRACT—CONSIDERATION—MUTUALITY.

A writing to the effect that A agrees to sell his home to B for a stated sum before a certain date by a sufficient conveyance of the fee is not a contract, as it lacks both consideration and mutuality, but is a mere offer of sale, subject to revocation by the vendor and acceptance by the vendee, if not then withdrawn.

From Union: ROBERT EAKIN, Judge.

Statement by MR. CHIEF JUSTICE BEAN.

This is a suit by A. P. Sprague against A. C. Schotte and
(48th Or.—39)

another to enforce the specific performance of the following written instrument:

"Elgin, Oregon, Feb. 6th, 1905.

This Agreement entered into this sixth day of February, 1905, between A. C. Schotte and A. P. Sprague, both of Elgin, Ore., whereby A. C. Schotte agrees to sell, deliver and transfer by good and sufficient warrantee deed to said A. P. Sprague his homestead on the Wallowa River; legal description is as follows: W. $\frac{1}{4}$ of N. $\frac{1}{4}$, S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, of Sec. 26, Tp. 3 North of Range 40 E. W. M., for the sum of sixteen hundred dollars (\$1600.00). This agreement is in force from this date to April first, 1905, when it will become void.

A. C. Schotte."

The complaint, after setting out the instrument in full, alleges that on March 8, 1905, the defendant Schotte, without the knowledge or consent of plaintiff, and for the purpose of defrauding him, sold and conveyed the land described in said instrument to his codefendant, the Palmer Lumber Company; that at the time of such purchase the lumber company had full knowledge and notice of the agreement in question and that plaintiff intended to comply therewith; that thereafter, and on the 11th day of March, the plaintiff, without notice or knowledge of the sale and conveyance to the lumber company, tendered to Schotte the full sum of \$1,600, the purchase price of the land, and demanded a deed therefor, but that he refused and neglected to make or execute the same. The prayer is for a decree that the lumber company be adjudged to hold the legal title to the property in question in trust for the plaintiff, and for \$500 damages. A demurrer to the complaint was sustained, the suit dismissed, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. C. E. Cochran*.

For respondent there was a brief and an oral argument by *Mr. Charles H Finn*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The demurrer was properly sustained. The instrument sued on is not a contract. There is no mutuality, and it is not sup-

ported by any consideration. It is merely a written offer by the defendant Schotte to sell the land therein described to the plaintiff at any time within the period stated, and was subject to revocation prior to acceptance: Bishop, Contracts, § 325; Wharton, Contracts, § 10; *Gordon v. Darnell*, 5 Colo. 302; *Dickinson v. Dodds*, L. R. 2 Ch. Div. 463; *Litz v. Goosling* (Ky.) 21 L. R. A. 127, note. It was capable of being converted into a valid contract by the tender of the purchase money within the time stated and before its withdrawal by Schotte: *Boston & Maine R. Co. v. Bartlett*, 3 Cush. 224. But, until such acceptance, there was no contract which could affect the title to the land or give the plaintiff vested rights therein: *Mers v. Franklin Ins Co.* 68 Mo. 127; 21 Am. & Eng. Enc. Law (2 ed.), 925. Where an offer like the one in question is accepted, the minds of the parties meet and the contract becomes complete and binding on the giver of the option and all who claim from him with knowledge thereof, and may be enforced against them: *Ross v. Parks*, 93 Ala. 153 (8 South. 368, 11 L. R. A. 148, 30 Am. St. Rep. 47); *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Barrett v. McAllister*, 33 W. Va. 738 (11 S. E. 220). But, until acceptance, it imposes no obligation whatever on either party, and is subject to revocation. The sale of the land by Schotte to the lumber company, as appears from the complaint, was made prior to the acceptance of the offer by the plaintiff and before there was any contract for the sale of such land. The plaintiff, therefore, had at the time no interest in the property, legal or equitable, which he could enforce against Schotte or a purchaser from him. It is unnecessary to consider whether the sale operated as a revocation or withdrawal of the offer. If it did not, and the subsequent acceptance by the plaintiff, without knowledge of such sale, converted the proposal into a valid contract between him and Schotte, such contract would not relate back and affect the title of the land at the time of the sale to the lumber company.

The decree is affirmed.

AFFIRMED.

Decided 18 December, 1906.

MORRISON'S ESTATE.

87 Pac. 1043.

NATURE OF PROBATE PROCEEDINGS.

1. Proceedings in county courts of Oregon, when such courts exercise probate jurisdiction, partake of the form of equity rather than law.

APPEAL—EQUITY PROCEEDINGS—REVIEW.

2. On an appeal from a decree in equity given in any court, the suit must be tried on the transcript and evidence accompanying it, as prescribed by B. & C. Comp. § 555.

APPEAL IN EQUITY—NO EVIDENCE—QUESTIONS REVIEWABLE.

3. Where, on an appeal from a decree in equity, no evidence is brought up to the appellate court, the only question reviewable is whether or not the pleadings are sufficient to uphold the decree.

PROBATE—PETITION AS COMPLAINT—WAIVER BY ANSWERING.

4. In a probate proceeding to require an executor to file a final report the petition is to be treated as a complaint, and fatal defects therein are not waived by answering, the practice being the same as prescribed by Section 72, B. & C. Comp., for civil cases.

EXECUTORS—PETITION FOR ORDER DIRECTING FINAL ACCOUNT.

5. A petition for an order requiring an executor or an administrator to file a final account must show that the estate is "fully administered," as stated in Section 1202, B. & C. Comp., or is ready for final settlement.

SAME—SUFFICIENCY OF PETITION—DUTY TO COLLECT ASSETS.

6. A petition by part of the heirs interested in an estate asking that the executor be directed to file a final report, in which it appears that the executor still has in his hands several notes, some of which are not due and others of which are of uncertain if any value, but it does not appear that the distributees have agreed to any distribution or disposal of the assets on hand is fatally defective, for the property on hand is incapable of ratable distribution, and should be reduced to money by the executor.

From Union: ROBERT EAKIN, Judge.

Proceeding by Cora L. Joel and another to compel P. A. McDonald, as administrator of the estate of John Morrison, deceased, to file a final account. From a judgment in favor of petitioners, defendant appeals. REVERSED.

For appellant there was a brief over the name of *Ramsey & Oliver*, with an oral argument by *Mr. Turner Oliver*.

For respondents there was a brief and an oral argument by *Mr. Charles H Finn*.

MR. JUSTICE MOORE delivered the opinion of the court.

This proceeding was instituted in the county court of Union County March 28, 1906, by Cora L. Joel and Minnie Goodman against P. A. McDonald, as administrator of the estate of John

Morrison, deceased, to compel the filing of a final account. The petitioners, for themselves and for their four brothers, naming them, state in their application, in effect, that Morrison died January 31, 1905, unmarried, without lineal descendant, and intestate, leaving in that county real and personal property; that McDonald was duly appointed as administrator of the decedent's estate by that court, and having qualified as such, gave the required notice to creditors, prepared and filed an inventory of the estate, showing the appraisement thereof to have been in cash \$6,410.95, personal property, including notes and accounts, \$12,388.70, and real estate, \$12,275, making a total of \$31,074.65; that on December 12, 1905, the administrator filed his first semiannual account, showing that he had received from the sale of personal property and from the collection of notes and accounts the sum of \$3,487.51, and that he had paid out for all purposes \$742.93, thus leaving in his hands in cash, including the money originally received, \$9,155.53; that the estate owes no debts, and the money so in hand should be distributed or put at interest; that there are no existing contracts affecting any of the property of the estate to prevent a final settlement thereof; that the following are all the heirs at law of the deceased, naming them, and stating their respective degrees of relationship to Morrison, which, by reference to the petition for the appointment of the administrator, shows that the petitioners and their brothers are entitled as tenants in common to an undivided one-fourth of such estate by right of representation from their deceased mother; that all of such heirs are of age; and that McDonald had been requested by the petitioners to settle the estate, that the assets thereof might be distributed. A citation having been issued and served on McDonald, he demurred to the petition on the ground, *inter alia*, that it did not state facts sufficient to constitute a cause of suit against him, but what action, if any, was ever had upon this demurrer, is not disclosed. An answer to the petition was filed, stating that the administrator had tried to collect the promissory notes that were payable to the estate, some of which were good and would be paid after harvest; that certain other notes were doubtful, and an

attempt to collect them by action would incur costs and disbursements, but the makers thereof had promised to pay them; and that several other notes were not then due, setting out a list of such commercial paper. A demurrer to the answer, on the ground that the facts stated therein did not constitute a defense, having been overruled, the court, in the same order, recited the averments of the answer in respect to the condition of the promissory notes, and thereupon denied the petition, and the petitioners appealed to the circuit court for that county, which reversed the order of the county court and remanded the cause, with directions to order the filing of a final account, in default of which to remove the administrator, and he appeals from such decree to this court.

1. The transcript does not contain any testimony, and the defendant's counsel state in their brief that none was taken in either court. The proceedings in the county court, when exercising jurisdiction in probate matters, are required to be in writing, and, though no particular pleadings or forms are prescribed, the practice is in the nature of a suit in equity as distinguished from an action at law: B. & C. Comp. § 1100.

2. Upon an appeal from a decree in equity given in any court, the suit must be tried upon the transcript and evidence accompanying it: B. & C. Comp. § 555.

3. If no evidence is brought up in such a case, the only question to be considered is whether or not the pleadings are sufficient to uphold the decree: *Howe v. Patterson*, 5 Or. 353; *Wyatt v. Wyatt*, 31 Or. 531 (49 Pac. 855).

4. As the decree rendered in the circuit court is based on the petition, the application to compel the administrator to file a final account must be treated as a complaint, which, if it fails to state facts sufficient to entitle the petitioners to the relief prayed for, the defect in this respect was not waived by answering over, if it be assumed that the demurrer to the petition was overruled: B. & C. Comp. § 72.

5. The sufficiency of the petition must be determined from an examination of the statute prescribing the time of filing a final account by the representative of a decedent's estate, which is as follows:

"When the estate is fully administered, it shall be the duty of the executor or administrator to file his final account:" B. & C. Comp. § 1202.

It will be remembered that the petition states that the personal property, including notes and accounts, belonging to Morrison's estate, was appraised at \$12,388.70, and that the administrator's semiannual account disclosed that he had received from the sale and collection of that class of assets the sum of \$3,487.51; thus conclusively showing that he had in his possession at the time the account was filed personal property and notes and accounts that had been valued by the appraisers at \$8,901.29. An administrator is required to collect the debts due the estate, and, if it appear that they remain uncollected through his fault, he is accountable therefor (B. & C. Comp. § 1206), but whether or not a reasonable time had elapsed for the performance of the duty thus imposed is not important, as the only question involved herein is the sufficiency of the petition.

In an application by a person interested in the ultimate accounting by an administrator or executor, the petition therefor must aver that the decedent's estate is ready for final settlement: 18 Cyc. 1132. The application in the case at bar does not comply with this requirement, nor does it allege that the estate "is fully administered," which fact is a condition precedent to the imposition of the duty on the decedent's representative to file a final account: B. & C. Comp. § 1202.

6. If it be assumed, however, that an averment that all the debts of the estate have been paid is equivalent to a declaration of the legal conclusion that the estate is fully administered, whereby the personal property, including the notes and accounts, devolve to the next of kin or distributees, it necessarily follows that all the heirs or persons interested must join in the application, as the petition, to compel the performance of the duty imposed on the representative, must allege that they had agreed among themselves to accept such assets in lieu of cash. Money, as a measure of the value of commodities, can be separated into ratable parts, while personal property, unless it is of the same kind and worth, it is not readily susceptible of an equal division.

Where this class of property, belonging to a decedent's estate, is to be distributed to several persons, reason establishes the rule that such assets should be converted into money in order that the proportional allotment might be facilitated. "The title to the personal property of a deceased person," says Mr. Justice BOISE, in *Winkle v. Winkle*, 8 Or. 193, "must be derived from the administrator through the orders of the court." An administrator or executor can transfer a chose in action to a distributee in payment, or on account of his share in an estate, and the latter may maintain an action thereon in his own name: *Weider v. Osborn*, 20 Or. 307 (25 Pac. 715).

If it be assumed that McDonald could assign a part of the promissory notes in his possession to the petitioners and their brothers, who are evidently entitled to an undivided one-fourth of Morrison's estate, and if it also be considered as true that they, as tenants in common, could secure such a title to the commercial paper as would authorize them to maintain actions thereon in their joint names, how is it possible to assign to them a ratable share of the choses in action, some of which are probably uncollectible, when it is remembered that three fourths of the notes belong to other heirs? If it be supposed that a lawful distribution of the personal property of a decedent's estate could be made to a part of the next of kin, who acquire a title thereto in their joint right, it might possibly be admitted that the remaining heirs could consent thereto, but the right to the assignment in such case would depend upon the agreement of all the interested parties. So, too, based on such assumption, all the distributees might stipulate that the personal property and choses in action, the proceeds of which would belong to them, might be divided in a specified manner, thus determining as between themselves that the estate was fully administered and possibly necessitating an ultimate settlement of their property interests, but in such case the right to insist upon the filing of a final account must depend upon the agreement. The contract whereby they stipulate, respectively, to receive specific articles of personal property or certain choses in action, or that such part of the estate may be converted into money by some other

person for their use and benefit, being the basis of their right, such agreement must necessarily be alleged, in order to enable them to secure a surrender of the property by the administrator or executor and the filing of a final account by him.

The petition in the case at bar fails in these respects, and hence it does not state facts sufficient to entitle the petitioners to the relief sought, and, this being so, the decree of the circuit court is reversed and the order of the county court affirmed.

AFFIRMED.

Decided 18 December, 1906.

SHANNON v. MALHEUR COUNTY COURT.

87 Pac. 1045.

HIGHWAYS—DUTY OF VIEWERS—PETITION AND ORDER.

Under Laws 1903, pp. 262, 269, §§ 20 and 21, providing for the opening of roads or gateways to isolated residences, the petitioner must ask for one or the other, but the county court must decide which one is appropriate, and the viewers must view the easement ordered—the discretion as to nature of the easement rests with the court and not with the viewers.

From Malheur: GEORGE E. DAVIS, Judge.

Writ of review by John Shannon against the county court of Malheur County and others. From a judgment for defendants, plaintiff appeals.

REVERSED.

For appellant there was a brief over the name of *King & Brooke*, with an oral argument by *Mr. William Henry Brooke*.

For respondents there was a brief over the name of *Albert Newman Soliss*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a writ of review to test the validity of the order and judgment of the County Court of Malheur County in the matter of the location of a road of public easement over and across the lands of the plaintiff, and comes here on appeal from the judgment of the court below affirming the rulings of the county court.

The proceedings are had under Sections 20 to 24, inclusive, of the road law of 1903: Laws 1903, p. 269. These sections are

substantially the same as Sections 4075 to 4079, inclusive, of Hill's Ann. Laws 1892, as amended in 1899: Laws 1899, p. 164. It is earnestly insisted that the law is unconstitutional and void because it provides for the taking of private property without due process of law and for private purposes. A similar law was held constitutional in *Towns v. Klamath County*, 33 Or. 225 (53 Pac. 604), and in *Sullivan v. Kline*, 33 Or. 260 (54 Pac. 154). The validity of such legislation has since been recognized: *Fanning v. Gilliland*, 37 Or. 369 (61 Pac. 636, 62 Pac. 209); *Lesley v. Klamath County*, 44 Or. 491 (75 Pac. 709); *Kemp v. Polk County*, 46 Or. 546 (81 Pac. 240). But it is unnecessary for us to re-examine the question at this time, as the judgment must be reversed on other grounds.

Neither the petition for the location of the road nor the order of the county court appointing the viewers and directing road specifies whether the proposed easement shall be a county road 30 feet in width or a gateway of a specified width, and not less than 10 nor more than 30 feet wide. That matter is left optional with the viewers—a power which it was held in *Lesley v. Klamath County*, 44 Or. 491 (75 Pac. 709), could not be exercised by them. The proceedings in the case referred to were had under the law now in question. The petitioner prayed that viewers be appointed to view out and locate a county road 30 feet in width, and the order of the county court followed the prayer of the petition. Objection was made to the proceedings on the ground that they did not leave it discretionary with the viewers to locate either a county road or a gateway, as in their judgment might seem best. The court held the objection without merit, saying: "The question presented depends upon the provisions of Sections 4966 and 4967, B. & C. Comp. Properly construed, the petitioner is authorized to petition for either a road or a gateway, and it is not optional with the viewers to establish which they may choose, but they must view out the easement prayed for, and as directed by the county court, so as to do the least damage to the land through which it may pass." In this case the viewers were not required to view out and

assess the damages sustained by the location of a definite easement, but were directed to "view out and locate a county road or gateway not less than ten nor more than thirty feet in width," and to assess the damages sustained, thereby leaving it optional with them whether they should locate the one or the other. The petitioner for the location of the road should have specified in his petition the easement desired, and the county court should have determined the one to be located and directed the viewers to proceed accordingly. Because neither the petition nor the order of the county court complied with the statute the proceedings are void.

REVERSED.

Decided 17 July, rehearing denied 28 August, 1905.

WEST v. HIGGINS.

81 Pac. 582.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action by F. S. West against J. W. Higgins and the Aetna Indemnity Company. From a judgment for plaintiff, defendant corporation appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Platt & Platt*, with an oral argument by *Mr. Harrison Gray Platt*.

For respondent there was a brief over the names of *Whitney Lyon Boise*, *Waldemar Seton* and *John T. McKee*, with oral arguments by *Mr. Boise* and *Mr. McKee*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is an action by F. S. West against J. W. Higgins and the Aetna Indemnity Company, a corporation, to recover damages for the breach of an agreement. The bill of exceptions shows that on July 29, 1902, the plaintiff entered into a contract with Higgins by the terms of which he, in consideration of \$2,425, stipulated to furnish the necessary materials and to erect for plaintiff a two-story dwelling house on the northeast corner of Fifteenth and East Taylor streets, in the City of Portland. The structure was to have been completed on or before November 15, 1902, and the contract price was payable at the rate of 80 per

cent of the valuation of the materials furnished, the last payment to be made 15 days from the acceptance of the building, provided the plaintiff was satisfied that no liens were filed against or could be placed upon the building. To secure the performance of the terms of this agreement, Higgins, as principal, and the Aetna Indemnity Company, as surety, executed to plaintiff an undertaking of almost the same tenor and effect as specified in the case of *Ausplund v. Aetna Indemnity Co.* 47 Or. 10 (81 Pac. 577), and the same proceedings were had, resulting in a judgment in plaintiff's favor for the sum of \$2,013.22 for money paid by plaintiff to prevent the sale of his property under decrees foreclosing liens for material used in the construction of his building, and the Aetna Indemnity Company appeals.

As the conclusion we have reached in the *Ausplund* case and in the case of *McKinnon v. Higgins*, 47 Or. 44 (81 Pac. 581), necessarily determines this appeal, the judgment is affirmed.

AFFIRMED.

Argued 18 July, decided 15 August, 1905.

JONES v. JONES.

81 Pac. 1135.

From Multnomah: ALFRED F. SEARS, JR., Judge.

For appellant there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. J. Couch Flanders*.

For respondent there was a brief and oral argument by *Mr. Henry E. McGinn*.

MR. JUSTICE MOORE delivered the opinion.

This is a suit by F. B. Jones against Carrie S. Jones for a divorce on the ground of adultery. The defendant also seeks affirmative relief. The cause was tried and the suit dismissed, whereupon the plaintiff appeals.

A careful examination of the transcript leads us to believe that the defendant is guilty as charged, and, without alluding to the testimony, much of which is not fit for publication, the decree

is reversed and one will be here entered, dissolving the bonds of matrimony now existing between the parties. REVERSED.

Argued 3 April, decided 10 April, 1906.

EX PARTE HUSSEY.

85 Pac. 332.

From Coos: JAMES W. HAMILTON, Judge.

Petition by E. D. Hussey for a writ of habeas corpus to secure his release from custody on a charge of violating the local option law. From a judgment denying the petition, petitioner appeals. REVERSED.

For appellant there was a brief over the names of *Sperry & Chase* and *J. M. Upton*, with an oral argument by *Mr. William Carlton Chase*.

For respondent there was a brief over the names of *A. M. Crawford*, Attorney General, and *A. M. Brown*, District Attorney, with an oral argument by *Mr. Homer Isaac Van Winkle*.

MR. JUSTICE MOORE delivered the opinion of the court.

The petitioner, E. D. Hussey, was convicted in the recorder's court of North Bend, Coos County, for violating the provisions of the local option act as claimed to have been adopted in that county November 8, 1904, by a majority of votes cast in favor of prohibition, and having been adjudged to pay a fine of \$50 and to be incarcerated until such amercement was paid, he petitioned the court to be discharged from the restraint thus imposed, on the ground that he was illegally deprived of his liberty. The petition was denied and he appeals.

In the case of *Marsden v. Harlocker*, 48 Or. 90 (85 Pac. 328), we decided that the vote on the local option act cast in Coos County, November 8, 1904, was void, and as the conclusion there reached is controlling herein it follows that the judgment in the case at bar must be reversed, and the cause remanded, with directions to discharge the prisoner; and it is so ordered.

REVERSED.

Decided 17 July, 1906.

PIERCE v. UNION COUNTY.

86 Pac. 5.

From Union: ROBERT EAKIN, Judge.

Proceedings by Union County for the laying out of a highway. From a judgment of the circuit court dismissing an appeal from the county court by Walter M. Pierce, a claimant for damages, he appeals. **AFFIRMED.**

For appellant there was a brief with an oral argument by *Mr. Charles H Finn*.

For respondent there was a brief over the names of *C. H. Crawford*, District Attorney, and *J. D. Slater*, with an oral argument by *Mr. Robert Jay Slater*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a claim for damages which the plaintiff, Walter M. Pierce, alleges he will sustain if the county court of Union County opens a county road across his premises. The facts involved herein are almost identical with the details stated in the case of *Müller v. Union County*, 48 Or. 266 (86 Pac. 3), except that in the case at bar the board of county road viewers found that Pierce would sustain no damages by the opening of the proposed road. The county court on October 8, 1905, approved this report as to the damages, but continued the matter as to establishing the road until January 5, 1906, when the route surveyed was declared a public highway. The plaintiff, 17 days thereafter, perfected an appeal from the latter order, and, the cause having been transferred to the circuit court for that county, the appeal was dismissed, and from such judgment an appeal was taken to this court.

The question here presented having been considered in and decided adversely to plaintiff's contention in the case adverted to, it follows that the judgment should be affirmed, and it is so ordered.

AFFIRMED.

Decided 11 September, rehearing denied 9 October, 1906.

MIRANDA v. CARLSON.

86 Pac. 1134.

From Harney: GEORGE E. DAVIS, Judge.

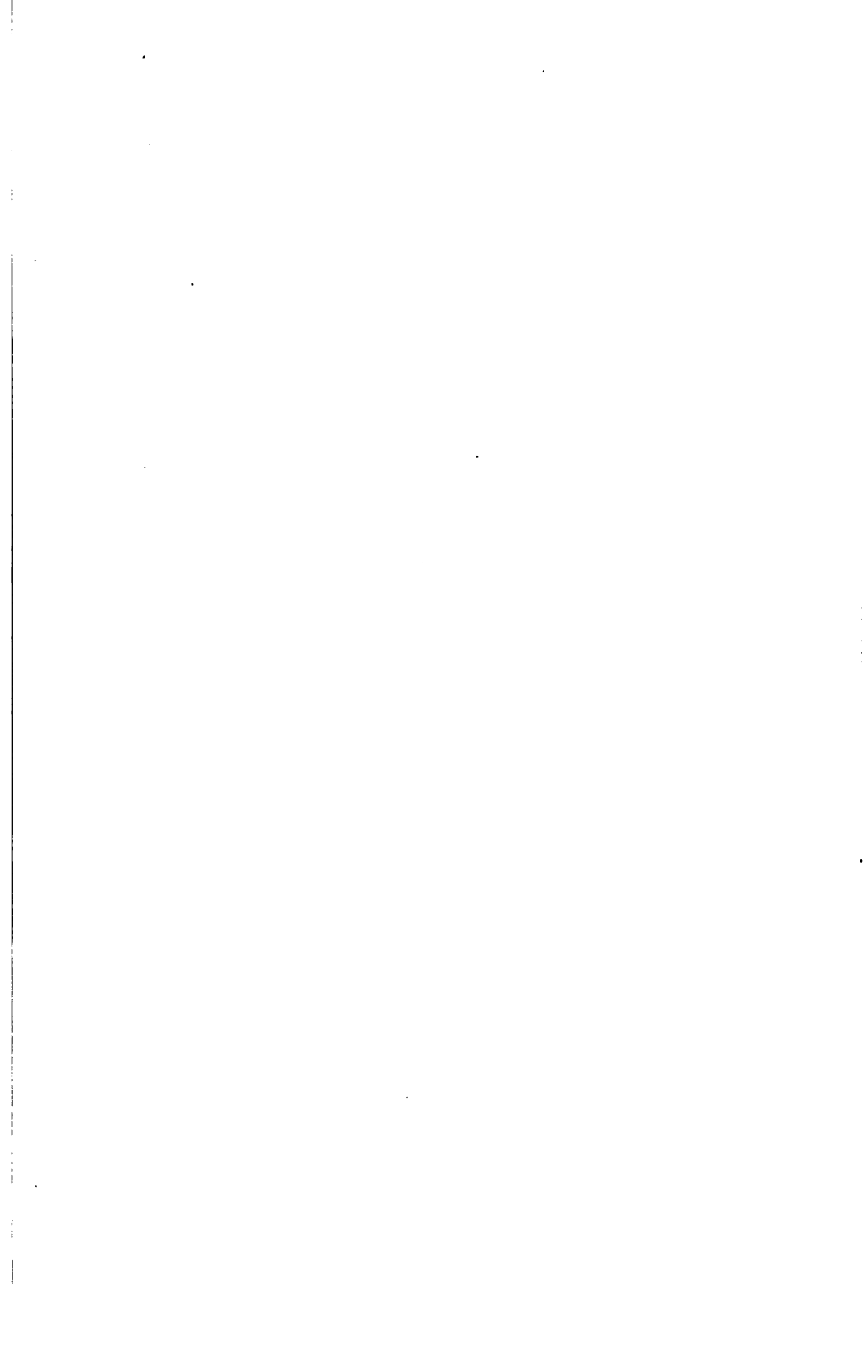
Suit by A. Miranda against Ed. Carlson, for an injunction, resulting in a decree for defendant, from which plaintiff appeals. The case was submitted on briefs under the proviso of Rule 16: 35 Or. 587, 601. AFFIRMED.

For appellant there was a brief over the name of *Lionel R. Webster*.

For respondent there was a brief over the name of *Parrish & Rembold*.

MR. JUSTICE HAILEY delivered the opinion of the court.

This is a suit to determine the rights of the parties herein to the waters of the west fork of Wild Horse or Alvord Creek in the southern portion of Harney County. The case involves questions of fact only, as to the priority of the rights of the parties, and no good purpose would be served by a review of the evidence. It is sufficient to say that the record and evidence have been carefully read and considered, and we think the decree of the lower court is correct, and it will therefore be affirmed. AFFIRMED.



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2. A county having sued to invalidate an exchange by its judge of sundry tax certificates which it owned for certain void warrants, to have the holders of such certificates declared trustees thereof for the county, to restrain their transfer, to recover the proceeds of any that had been sold, and the amount for which the certificates had been bid in by the county, on the theory that the certificates were still outstanding, is entitled to appeal from a decree merely declaring the entire exchange void, since it had asked for a recovery of the value of such certificates as had been sold, it being shown that most of such certificates had been taken up by the property owners and canceled before the filing of the suit.

Multnomah County v. White, 183.

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7. The time allowed after perfecting an appeal within which a transcript must be filed in the appellate court does not begin to run until the time allowed to except to the sureties has expired, computed by excluding the first day and including the last. *Boothe v. Scriber*, 561.

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8. A party having filed an undertaking on appeal on August 24th, the adverse party has five days to except and the appellant thirty days thereafter to file the transcript, which will expire on September 29th, and a filing on that day is within the time limited. *Boothe v. Scriber*, 561.

APPEAL IN PROBATE—JURISDICTION ACQUIRED.

9. On an appeal from a decree in equity given in any court, the suit must be tried on the transcript and evidence accompanying it, as prescribed by B. & C. Comp. § 555. *Morrison's Estate*, 612.

APPEAL IN EQUITY—NO EVIDENCE—QUESTIONS REVIEWABLE.

10. Where, on an appeal from a decree in equity, no evidence is brought up to the appellate court, the only question reviewable is whether or not the pleadings are sufficient to uphold the decree. *Morrison's Estate*, 612.

AMENDING BILL OF EXCEPTIONS AFTER DECISION ON APPEAL.

11. Where a bill of exceptions, through mistake has been so made up as not to state the truth, it may on proper showing and notice be amended *hoc pro tunc* at a subsequent term and before the hearing in the supreme court, but the state which has argued and submitted its cause on a bill of exceptions stating the truth may not obtain from the trial court by way of amendment a new bill after the case has been decided against it on appeal, for the purpose of arguing in a petition for a rehearing that the error shown by the original bill was harmless. *State v. Jennings*, 483.

AVAILABLE ERROR—RULING FOLLOWING ADMISSIONS.

12. Error cannot be predicated on rulings of a judge following admissions in the pleadings, as, for instance, in admitting as evidence a contract on which the plaintiff counts and which the defendant admits having executed. *Enterprise Hotel Co. v. Book*, 58.

OBJECTIONS NOT MADE AT TRIAL.

13. Objections to evidence not made at the trial are not available on appeal. For example: An objection to impeaching testimony that it was not proper for that purpose will not support an argument that the witnesses did not appear to be qualified. *State v. Mixis*, 165.

QUESTION FIRST RAISED ON APPEAL.

14. Subject to certain statutory exceptions, questions not presented to and ruled upon by the trial court cannot be considered by the supreme court. *State ex rel. v. Frost*, 236.

SAME—CASE UNDER CONSIDERATION.

15. A referee having returned a part of the testimony in a case, the action of the parties in submitting the cause without any proceeding to secure the balance of the testimony precludes the supreme court from considering the conduct of the referee. *State ex rel. v. Frost*, 236.

QUESTION NOT RAISED AT TRIAL.

16. Objections to evidence not made when the exception is saved will not be considered on appeal. *State v. Jennings*, 483.

SAME—CASE UNDER CONSIDERATION.

17. An objection to certain questions because they show an attempt of a party to impeach his own witness, in violation of Section 850, B. & C. Comp., does not support an objection that the party has not laid a foundation of surprise. *State v. Jennings*, 483.

BRIEFS—ASSIGNMENTS OF ERROR.

18. Supreme Court Rule 32, subd. b (35 Or. 605), requiring appellant to serve a brief containing a concise statement of the errors on which he relies, is satisfied by a substantial compliance therewith.

First National Bank v. Miller, 587.

SAME—CASE UNDER CONSIDERATION.

19. Where an assignment of errors in a brief stated that the court erred in giving, over objection and exception, certain instructions setting them out in distinct paragraphs containing but a small part of the entire charge, and not indicating the language complained of under separate assignments, the supreme court will not be so technical as to hold that if either of the parts of the charge so generally expressed correctly stated the law the entire assignment would be unavailing.

First National Bank v. Miller, 587.

DISMISSAL BECAUSE OF NEWLY DISCOVERED EVIDENCE.

20. A motion to dismiss an appeal because of newly discovered evidence material to the cause of the appellant should be overruled, the proper proceeding being by a suit to annul the order appealed from; and a claim of settlement during the trial in the lower court between the respondent and one jointly liable with the appellants, without the knowledge of appellants, and which was concealed from them, is in the nature of newly discovered evidence not justifying a dismissal of the appeal.

Livesley v. Johnston, 40.

MOTION TO DISMISS.

21. The consideration of a motion to dismiss an appeal, involving the merits of the dispute, may appropriately be continued until the final hearing.

Multnomah County v. White, 183.

SUBSEQUENT WAIVER OR TERMINATION—EVIDENCE DEHORS.

22. Where the controversy has been settled after the entry of the judgment or decree appealed from, or the right of appeal has been in some manner waived, evidence outside the record is admissible to establish the facts as a basis for a motion to dismiss.

Livesley v. Johnston, 40.

PRESUMPTION AS TO ERROR HAVING OCCURRED.

23. Error is not presumed, but must affirmatively appear from the bill of exceptions.

Austin v. Vanderbilt, 206.

SAME—CASE UNDER CONSIDERATION.

24. In an action for the conversion of diamonds, the admission of evidence as to the value of flawless diamonds cannot be considered as error unless the bill of exceptions shows that the stones in question were not of that kind.

Austin v. Vanderbilt, 206.

SAME.

25. Error on the part of a trial court is never presumed, the presumption being that evidence was received or excluded as required by law, unless the contrary appears.

State v. Jennings, 483.

PRESUMPTION THAT EVIDENCE WAS PROPERLY ADMITTED.

26. Where testimony that is inadmissible under the pleadings has been

received without objection, it will be presumed on appeal that the cause was tried as though there had been an issue on the subject to which the evidence related. *Pierson v. Fisher*, 223.

PRESUMPTION AS TO BASIS FOR INSTRUCTION.

27. An instruction will always be presumed to have been based on evidence where the bill of exceptions does not purport to contain all the testimony, and it does not appear by the record that no testimony was offered on that point. *Baker County v. Huntington*, 593.

DISCRETION—GRANTING CONTINUANCE.

28. Applications for continuances are largely within the discretion of the trial court and will not ordinarily be reviewed. In this case the court acted wisely. *State v. Miste*, 165.

CONCLUSIVENESS OF FINDINGS.

29. Findings of a judge made after a trial without a jury have the force and effect of a verdict, and cannot be disturbed if they are supported by any competent evidence. *Savage v. Salem Mills Co.* 1.

HARMLESS ERROR—EXCLUSION OF EVIDENCE—SUBSEQUENT ADMISSION.

30. In an action for breach of a contract the sustaining of objections to questions to witnesses as to whether there was any prior contract between the parties was not injurious to the party propounding the questions, where it appeared that witnesses were subsequently permitted to testify to all the circumstances surrounding the contract and the negotiations between the parties. *Jennings v. Oregon Land Co.* 287

SAME.

31. Error in admitting hearsay evidence is harmless where the same information is given by other witnesses without objection.

State v. White, 416.

SAME—CASE UNDER CONSIDERATION.

32. In a prosecution for kidnapping, the refusal to strike out as hearsay testimony of the person kidnapped as to what third persons said defendant had stated to them is not prejudicial to defendant, where one of such third persons testifies to what defendant told them and it is substantially the same as the hearsay testimony. *State v. White*, 416.

SAME—CASE UNDER CONSIDERATION.

33. In a prosecution for kidnapping a seaman, statements by a third person as to what defendant said he would do to the prosecuting witness if he attempted to board a certain ship were properly admitted over objection that defendant did not hear them, where it is shown defendant heard the important statements, though he did not hear the preliminary conversation, and afterward made practically the same statements.

State v. White, 416.

SAME—IRRELEVANT EVIDENCE.

34. Where a trial for a misdemeanor is held without a jury, the defendants admitting the acts complained of, but claiming the right to commit them, the admission of irrelevant evidence is harmless.

Portland v. Cook, 550.

SAME—CONSTRUCTION OF CONTRACT BY JURY.

35. Under B. & C. Comp., § 136, making it incumbent on a court to interpret written instruments, error in submitting them to the jury is harmless if their finding thereon is correct.

Baker County v. Huntington, 593.

RIGHT OF SUPREME COURT TO MODIFY EXCESSIVE VERDICT.

36. The supreme court cannot reduce an excessive verdict, since the size of the verdict presents only questions of fact, and they cannot be reviewed under the Oregon practice. *Lindsay v. Grand Ronde Lum. Co.* 430.

REMANDING LAW ACTIONS—AMENDMENTS IN TRIAL COURT.

37. When a judgment in a law action is reversed on appeal, and the cause remanded for a new trial or for further proceedings, the court below possesses power to allow reasonable amendments to be made to the pleadings, and its action in this respect will not be disturbed, except for an abuse of discretion. *State ex rel. v. Richardson*, 309.

SAME.

38. Where on appeal a judgment sustaining a demurrer to an alternative writ of mandamus and dismissing proceedings to compel the doing of certain acts by a county court has been affirmed, the order of affirmance concluding, "It is further ordered that the cause be remanded to the said court below, and that a judgment be there entered and docketed in accordance therewith," the trial court is not precluded from allowing the alternative writ of mandamus to be amended. *State ex rel. v. Richardson*, 309.

REMANDING EQUITY SUITS—AMENDMENTS IN TRIAL COURT.

39. It is discretionary with the supreme court in equity to either decide a case finally or to send it back for further proceedings when the appeal has been taken on the pleadings or when the evidence is unsatisfactory on material points, and in such cases the trial court may, in its discretion, permit amendments to the pleadings after the cause has been remanded.

State ex rel. v. Richardson, 309.

SAME.

40. The rule that whenever the supreme court does not make a final disposition of a cause on appeal from an order overruling a demurrer to the complaint, but remands the same to the court below, the latter may determine in the first instance whether or not defendant shall be permitted to answer, applies only to suits in equity.

State ex rel. v. Richardson, 309.

DISPOSITION OF CAUSE AFTER AFFIRMANCE—REMANDMENTS.

41. Plaintiff brought suit for himself and others not connected with his interest, and, after the sustaining of a demurrer to his amended complaint, refused to plead further, whereupon the cause was dismissed. *Held*, that, the decree having been affirmed on appeal, the cause would not be remanded to permit plaintiff to apply for leave to amend by substituting a cause of action in his own favor only.

Oregon v. Warner Stock Co., 378.

As to Costs on Appeal in Equity Cases, See COSTS.

APPEARANCE.

Effect of as to Jurisdiction Over Subject Matter. See COURTS, 1.

APPLIANCES.

Duty of Master as to Furnishing Most Approved. See MAST & SERV. 2.

APPROPRIATION.

Effect of Diverting From Another's Ditch. See WATERS, 16.

Seizure of Water From Another Not Valid. See WATERS, 16.

Local Custom of Appropriation—Judicial Notice. See WATERS, 1.

ASSIGNMENTS FOR CREDITORS.

ACCOUNTING—EVIDENCE.

The evidence shows that F. L. Richmond, W. T. Wright and F. A. E. Starr have fully accounted to Fred Nodine for all property transferred to them by him in April, 1894, and that in the performance of their duties as trustees and assignees they acted throughout in good faith, with entire honesty, and with fidelity to the parties interested in the disposal of the property.

Nodine v. Richmond, 527.

ASSIGNMENTS OF ERROR. See **APPEAL**, 18, 19.

ASSUMPSIT.

Action for Money Paid on Contract That Has Subsequently Been Repudiated by Vendor. See **CONTRACTS**, 11.

ASSUMPTION.

Known Risk—Continuing in Employment. See **MAST. & SERV.** 4.

Insufficient Evidence of Assuming Risk. See **MAST. & SERV.** 5.

ATTACHMENT.

DURATION OF LIEN.

1. Under Section 301, B. & C. Comp., providing how an attachment shall be levied on real property, and Section 303, providing that attachment notices shall be recorded and that thereupon "the lien in favor of plaintiff shall immediately attach to such real property," the lien of an attachment clings to real property until the debt is paid or the property is sold under an execution pursuant to a judgment in the case, or the judgment or attachment is released in some manner provided by law, and the lien is not affected by a failure to properly docket the judgment, when recovered.

Katz v. Obenchain, 352.

EFFECT OF UNDOCKETED JUDGMENT ON ATTACHMENT LIEN.

2. Where a judgment is merely entered in the court record without being docketed, the attachment lien remains unaffected.

Katz v. Obenchain, 352.

EFFECT OF ATTACHING PROPERTY OF NONRESIDENT.

3. The effect of attaching property of a nonresident is to hold such property until final judgment, but it does not afford a basis for a general judgment.

Katz v. Obenchain, 352.

MONEY RECEIVED—ATTACHMENT—IMPLIED CONTRACT.

4. An action to recover money paid on a contract that the other party afterward repudiated is in form an action of *assumpsit* and the legal liability to repay is an implied contract for the direct payment of money, under B. & C. Comp. § 296, subd. 1.

Hanley v. Combs, 409.

PRIORITY BETWEEN ATTACHMENT AND UNRECORDED DEED.

5. An attachment levied in good faith on land that has been conveyed for more than five days without the instrument being recorded, and without knowledge of such conveyance, takes precedence of such conveyance, under Sections 302 and 5359, B. & C. Comp., relating to attachments and the recording of deeds.

Haines v. Connell, 469.

SUFFICIENCY OF SHERIFF'S CERTIFICATE OF ATTACHMENT.

6. Under Section 301 of B. & C. Comp., requiring a sheriff, after levying an attachment, to deliver to the county clerk a certificate containing the title of the cause, the names of the parties, a description of the property seized, and a statement that the same has been attached, such

a certificate may be sufficient, though it does not contain as a caption the title of the cause or the names of the parties, if such matters appear in the body of the certificate. *Haines v. Connell*, 469.

CERTIFICATE OF ATTACHMENT—NEED OF CORRECT CAPTION.

7. If it is attempted to give the title of a cause and the names of the parties in a caption to a certificate of attachment, it must be given correctly or the certificate will not be valid. *Haines v. Connell*, 469.

ATTACHMENT CERTIFICATE—NECESSITY OF CAPTION.

8. A sheriff's certificate of attachment of real estate, which recites in the body thereof the names of the respective parties in the cause and the title of the court from which the writ issued, is sufficient without having a caption stating the title of the cause and the names of the parties, or any caption whatever. *Haines v. Connell*, 469.

PRIORITY BETWEEN ATTACHMENT AND DEED—PLEADING GOOD FAITH OF CREDITOR AS AN AFFIRMATIVE DEFENSE.

9. In a suit involving the relative rights of an attaching creditor and the holder of a deed to the same land, the creditor must plead affirmatively that the attachment was levied in an attempt to collect a genuine debt and without notice or knowledge of the interest of the deed claimant; it will not be sufficient to rely on a denial of the charge by the deed claimant that the attachment was levied with notice of the deed. *Haines v. Connell*, 469.

PLEADING—ADMISSION BY FAILURE TO DENY.

10. This case affords an illustration of the general statutory rule, B. & C. Comp., § 95, that affirmative allegations not denied are to be taken as true. A deed not having been recorded, an attachment was levied on the land as that of the grantor, whereupon the grantee sued to restrain further proceedings under the attachment, and for a cancellation of the same as a cloud on his title, alleging that the defendant had notice of plaintiff's claim to the property at the time the attachment was levied. The answer denied the allegations of the complaint, and also set up facts showing defendant to be a *bona fide* purchaser. These facts were not denied by reply. *Held*, that, the facts showing defendant to be a *bona fide* purchaser were admitted. *Haines v. Connell*, 469.

ATTORNEY AND CLIENT.

RELATION BETWEEN ATTORNEY AND CLIENT—CONTRACTS FOR FEES.

1. The relation between an attorney and a client is one requiring the utmost fairness by the attorney and contracts between them advantageous to the former will be closely scrutinized; yet care must be exercised to avoid injustice, for clients are often anxious to secure the services of capable attorneys of reputation and tact, and willingly contract for fees that seem very high in comparison with the charges made by attorneys of less reputation. *Hamilton v. Holmes*, 453.

INADEQUATE CONSIDERATION.

2. The testimony in this case does not show such a wide difference between the value of the property conveyed and the value of the services performed as to shock the conscience of a chancellor and render the transaction constructively fraudulent. *Hamilton v. Holmes*, 453.

ATTORNEY'S LIEN—WHEN BECOMES ENFORCEABLE.

3. Both by general law and the terms of the Oregon statute (B. & C. Comp. § 1063) an attorney has no lien for his services before judgment or

decree, and until then the client may dismiss or compromise the case without reference to any contract with the attorney.

Jackson v. Stearns, 25.

VALIDITY OF AGREEMENT WITH ATTORNEY NOT TO COMPROMISE LEGAL PROCEEDING—PUBLIC POLICY.

4. A clause in a contract stipulating for the payment of compensation to an attorney for performance of service in prosecuting a legal proceeding, and providing that the client shall not settle or dismiss the proceeding prior to the rendition of judgment, when the attorney's lien would attach, is against public policy and void.

Jackson v. Stearns, 25.

REMEDY OF ATTORNEY FOR FRAUDULENT DISMISSAL OF ACTION.

5. Though a party may without the consent of his attorney make a *bona fide* adjustment with the adverse party and dismiss a legal proceeding, yet if it appears that the adjustment was collusive, and with the intent on the part of both parties to defraud the attorney, the court may, to protect him, set aside the dismissal, and permit him to proceed in the cause in the name of his client to a final determination to ascertain what sum, if any, is due for his services.

Jackson v. Stearns, 25.

COLLUSIVE DISMISSAL OF SUIT—RIGHTS OF INJURED ATTORNEY.

6. Where a client, without the knowledge or consent of his attorney, settles a legal proceeding collusively for the purpose of depriving the attorney of his fees, the latter may, by giving to the party sought to be charged notice of his intention to continue the cause in the name of his client for the recovery of his fees only, continue the proceeding for that purpose, and hence is not entitled to maintain a proceeding to enjoin the dismissal.

Jackson v. Stearns, 25.

FRAUDULENT COMPROMISE OF SUIT—INTENT OF CLIENT.

7. Before a court will set aside an order dismissing a legal proceeding without the consent of plaintiff's attorney, and allow the latter to proceed with the cause in the name of his client to determine the amount of fees due him, it must appear that the client participated in the fraudulent intent to deprive the attorney of his compensation.

Jackson v. Stearns, 25.

FRAUDULENT COMPROMISE—EVIDENCE OF BAD FAITH.

8. Where a legal proceeding is settled without the consent of the attorney, who has performed services under a contract, the adequacy of the consideration is an element to be considered in determining whether the settlement was made in good faith.

Jackson v. Stearns, 25.

FRAUDULENT SETTLEMENT OF SUIT—PLEADING BAD FAITH.

9. In a suit by an attorney for the double purpose of enjoining the dismissal of another suit, on the ground that such dismissal was collusive and for the purpose of defrauding him of his fees, and to set aside a deed made pursuant to dismissal, an allegation that the value of the property conveyed by the deed was \$3,000, but that the deed was executed for a nominal consideration, is sufficient as an averment of the bad faith of the defendant in the original suit.

Jackson v. Stearns, 25.

FORCE OF DEDUCTIONS BY TRIAL COURT IN ITS OPINION.

10. Under Section 158, B. & C. Comp., providing that on the trial of an issue of fact by the court its written decision shall state the facts found and conclusions of law separately, without argument or reason therefor, and that the court may deliver any argument or reason in support of such decision, either orally or written, separately therefrom, and file the same with the clerk, where there was a contention as to whether plaintiffs'

cause of action was based entirely on an original contract or on the contract as amended by the parties, a deduction by the court in its opinion that plaintiff's counsel claimed that such cause of action was based entirely on the original contract, though not equivalent to a positive statement to that effect, is entitled to consideration as an assertion of a solemn admission by one of the parties. *Heywood v. Doernbecher Mfg. Co.* 359.

ADMISSIONS—EFFECT OF.

11. The admissions of an attorney, made within the scope of his authority and during the continuance of his employment, bind his client to the same extent as a stipulation. *Heywood v. Doernbecher Mfg. Co.* 359.

AVAILABLE ERROR.

Rulings Following Admissions Not Erroneous. See *APPEAL*, 12.

Objections Not Reserved in Trial Court. See *APPEAL*, 12-17.

BAILMENT.

DEPOSITS OF WHEAT IN WAREHOUSE—SALES OR BAILMENTS.

Where one delivers grain to a keeper of a warehouse and mill under an agreement that either the identical grain or the same amount of a similar kind and quality shall be returned out of the common mass of which it became a part, there is a bailment of such property, and consequently the ownership and risk of loss remain in the depositor.

Savage v. Salem Mills Co. 1.

BANKRUPTCY.

RIGHT OF TRUSTEE TO POSSESSION OF ATTACHED PROPERTY.

1. Under the national bankruptcy law of 1898 (30 Stat. U. S. c. 541, § 70, subds. "a" and "e"), a trustee at once upon qualifying becomes by operation of law vested with the legal title to all the unexempt property of the bankrupt, and from that date is presumably in possession thereof unless the contrary affirmatively appears, notwithstanding such property may have been already seized upon legal process from some other court.

Goodnough Mercantile Co. v. Galloway, 239.

JURISDICTION OF STATE COURT OVER SUIT AGAINST TRUSTEE.

2. After a trustee in bankruptcy has qualified no suit can be commenced against him without his consent in any state court to enforce a lien upon personal property belonging to the bankrupt's estate.

Goodnough Mercantile Co. v. Galloway, 239.

EFFECT OF ORDER OF BANKRUPTCY ON PRIOR ATTACHMENTS.

3. Under Section 67, subd. "f" of the national bankruptcy act of 1898, relating to attachments against the property of insolvents prior to an adjudication of bankruptcy, an attachment levied on such property within four months prior to the filing of a petition in bankruptcy is discharged by the order of adjudication, unless there is an order preserving such lien.

Goodnough Mercantile Co. v. Galloway, 239.

JURISDICTION OF STATE COURTS OVER SUITS AGAINST TRUSTEES AFTER AN ADJUDICATION OF BANKRUPTCY.

4. Under Section 21, subd. "e" of the national bankruptcy act of 1898, the title to the unexempt property of the bankrupt becomes vested in the trustee at once upon the approval of his bond, effective by relation as of the date when the adjudication of bankruptcy was made, and thereafter no suit can be commenced by any one in any other court to enforce any lien upon any personal property of the bankrupt, regardless of where the physical possession thereof may be when such suit is commenced.

but the claim must be presented to and adjudicated by the bankruptcy court, since it first obtained jurisdiction over the property.

Goodnough Mercantile Co. v. Galloway, 239.

WAIVER BY TRUSTEE OF OBJECTION TO JURISDICTION.

5. When a trustee has been sued in a state court for part of the bankrupt's property, and has demurred to the jurisdiction over the subject-matter of the suit, and upon the objection being overruled, has answered to the merits, it cannot be said that he has waived the objection to the jurisdiction of the court over the subject-matter.

Goodnough Mercantile Co. v. Galloway, 239.

Notes—Effect on Other Signers of Payment by Trustee in Bankruptcy of One Signer. See **LIMITATION OF ACTIONS**.

BANKS OF STREAMS.

Right to Protect by Embankments or Jetties. See **WATERS**, 6.

BEST AND SECONDARY EVIDENCE.

Waiving Requirement of the Best Proof. See **EVIDENCE**, 8.

BILL OF EXCEPTIONS.

Error Must Affirmatively Appear in the Bill. See **APPEAL**, 23-27.

Amending After Defeat to Avoid Effect of Decision. See **APPEAL**, 11.

BILL OF REVIEW.

PROCEDURE ON DISCOVERING EVIDENCE AFTER JUDGMENT.

Where a defeated party discovers material evidence favorable to him after appealing from a final order, his remedy is by an original suit to impeach the judgment or decree already entered.

Livesley v. Johnston, 40.

BILLS AND NOTES.

RIGHT TO RECOVER FROM ACCOMMODATION PARTY.

Under the express provisions of Section 4431, B. & C. Comp., the holder of a note for value is entitled to recover thereon against an accommodation party, though the holder had notice at the time he took the note that the person sought to be charged was only an accommodation party.

White v. Savage, 604.

Effect of Payment by Trustee in Bankruptcy on Liability of Solvent Signers—Extending Note. See **LIMITATION OF ACTIONS**.

BOND FOR DEED.

Effect of Bond—Equity—Strict Foreclosure. See **VEND. & PUR.** 1.

Failure of Obligor—Equity—Forfeiture. See **VEND. & PUR.** 9.

BRIEFS.

Sufficiency of Statement of Points Relied on. See **APPEAL**, 18, 19.

BUILDING CONTRACTS.

Construction of as to Requests for Changes—Waiver. **CONTRACTS**, 6

Construction of Provision as to Exactness—Extras. See **CONTRACTS**, 7.

BURDEN OF PROOF.

Fraudulent Transactions Between Relatives. See **FRAUD. CONVEY.** 2.

When Deed is Found in Possession of Grantee. See **DEEDS**, 1.

When Deed by Incompetent is Unconscionable. See **CANCEL. OF INST.** 5.

When Domicile is Shown at Particular Place. See **DOMICILE**, 2.

CANCELLATION OF INSTRUMENTS.**FRAUD—FAILURE OF CONSIDERATION.**

1. Where a wife, while estranged from her husband and in love with another, induced the husband to convey property to her on her representation that if he did so she would resume marital relations with him, which she had no intention of doing, and, on the execution of the deed, refused to keep her promise with the purpose of continuing her relations with such other person, the husband was entitled to a decree canceling the deed.

Jennings v. Jennings, 69.

PROPER AMENDMENT TO COMPLAINT.

2. A bill by a husband against his wife to set aside a deed to her averred that, prior to the execution of the deed, their relations were strained, without setting out the particulars thereof or the reasons therefor. It alleged that the deed was executed pursuant to defendant's promise that in such event she would resume marital relations with plaintiff, which she had no intention of doing, and which she absolutely refused to do as soon as the deed was made. Before answer plaintiff filed an amended bill, in which he alleged defendant's relations with another and her unlawful association with him, and alleged an act of adultery committed after the filing of the original bill. *Held*, that the matters so alleged, being germane to the original cause of suit and admissible under the original bill, were properly introduced by amendment.

Jennings v. Jennings, 69.

RETURN OF CONSIDERATION—FRAUD.

3. It is always necessary, as a condition precedent to the cancellation of an instrument or the rescission of a contract, to return or offer to return the consideration received, so that the parties may be placed in their original positions; unless the contract was accomplished by force or fraud, in which cases no return or offer of the consideration is necessary.

Pierson v. Fisher, 223.

EXAMPLE OF FRAUD.

4. Where the grantor in a deed executed the same, but never voluntarily delivered it to the grantee, and never consented to receive as a part of the consideration the grantee's note and certain stock, which the latter left with the grantor on taking the deed from a table without the grantor's permission, no title passed by the deed, and no obligation rested on the grantor to offer to return the note and stock as a condition of the right to have the deed set aside as a cloud on title.

Pierson v. Fisher, 223.

FRAUD—UNDUE INFLUENCE—EVIDENCE—BURDEN OF PROOF.

5. The evidence of the plaintiff compels the inference that the grantee in the deed sought to be canceled unduly influenced the grantor to execute it, thereby casting on the grantee the burden of showing that the grantor understood what he was about to do, and that his consent to the deed was not obtained through taking advantage of his depressed mental and physical condition.

Owings v. Turner, 462.

SUFFICIENCY OF EVIDENCE.

6. The evidence for defendant is not sufficient to overcome the inference created by the plaintiff's case that the deed in question was obtained through undue influence.

Owings v. Turner, 462.

CANCELLATION OF INSTRUMENTS—RESTORING CONDITIONS—TENDER.

7. In a suit to set aside a conveyance for fraud and undue influence, it appeared that plaintiff had received, in consideration of the conveyance,

deeds to two tracts of land. Plaintiff was mentally deficient, and led his attorney to believe that he had executed to defendant a deed to one of the tracts, so that a deed to the other tract was the only deed tendered before the suit was commenced. At the trial, when it was ascertained that no deed had been given to the former tract, a deed thereto was executed by plaintiff and tendered. *Held*, that the tender was sufficient.

Owings v. Turner, 462.

CAPTION.

Need of Caption on Attachment Certificate. See **ATTACHMENT**, 8.

Necessity of Correct Caption or None at All. See **ATTACHMENT**, 7.

CARRIERS.

NEGLIGENCE—RES IPSA LOQUITUR.

In an action for injuries to a passenger caused by the sudden closing of a railway car door on his hand, any presumption of negligence arising from the accident is overcome by the uncontradicted evidence that the catch provided for the car door was in good repair, and that the train was not operated at a dangerous rate of speed, and hence a verdict was properly directed in favor of defendant.

Goss v. Northern Pac. Ry. Co. 439.

CASES IN THE OREGON REPORTS Approved, Cited, Distinguished and Overruled in This Volume. Same as **OREGON CASES**.

CATTLE. See **ANIMALS**.

CAVEAT EMPTOR.

Right to Resell Lots Sold Under Prior Proceeding. See **MUNIC. CORP.** 3.

Rights of Contractors Buying at Sales Held to Enforce Their Own Contracts. See **MUNICIPAL CORPORATIONS**, 5.

CERTIFICATE.

Transcript on Appeal to Circuit Court. See **JUSTICES OF THE PEACE**.

CERTIORARI. Same as **WRIT OF REVIEW**.

CHANGING VENUE.

Application for is Addressed to Discretion of Judge. See **CRIM. LAW**, 1.

CHARGING JURY.

Instructions Must be Considered as a Whole. See **TRIAL**, 3.

Example of Charge Not Assuming Facts. See **OFFICERS**, 3.

Special Instructions Must be Requested. See **TRIAL**, 6.

CHARTERS OF CITIES.

Portland, 1903, § 400, pp. 87, 89.

§ 412, pp. 89, 90.

CHATTEL MORTGAGES.

EFFECT OF RECORD OF UNACKNOWLEDGED CHATTEL MORTGAGE.

1. Under Sections 5630 and 5631, B. & C. Comp., providing that chattel mortgages "shall" be acknowledged by the maker and that "such" mortgages may be recorded, an unacknowledged chattel mortgage is not entitled to be recorded and its presence in the record books does not impart to any one notice of its existence.

Williams v. First National Bank, 571.

EFFECT OF ACTUAL KNOWLEDGE OF PRIOR CHATTEL MORTGAGE.

2. Persons taking chattel mortgages on property with actual knowledge of a prior mortgage are not mortgagees "in good faith" within the meaning of Section 5633, B. & C. Comp., and their mortgages are not entitled to precedence, though the prior mortgage was unacknowledged, in consequence of which its actual record was not notice.

Williams v. First National Bank, 571.

CHATTEL MORTGAGE—REMOVAL TO ANOTHER COUNTY—KNOWLEDGE.

3. The effect of actual knowledge of an existing prior unrecorded chattel mortgage is not affected by a removal of the property to another county, Section 5632, B. & C. Comp., being applicable only to subsequent lienors for a valuable consideration and without notice.

Williams v. First National Bank, 571.

CHILD LABOR.

Regulation—Constitutional Right to Contract. See **CONST. LAW**, 9.

Regulation—Deprivation of Liberty or Property—Due Process of Law—Equal Rights of Citizens. See **CONST. LAW**, 15-18.

CHILLING BIDDING. Sufficiency of Evidence. See **EXECUTION**, 5.

CITIES. Same as **MUNICIPAL CORPORATIONS**.

CITY CHARTERS. Same as **CHARTERS OF CITIES**.

CITY ORDINANCES. Same as **ORDINANCES OF CITIES**.

CLAIM AND DELIVERY. Same as **REFLEVIN**.

CLASS LEGISLATION.

Special Immunities as to Contracts for Labor. See **CONST. LAW**, 13, 14.

CLOUD ON TITLE. Same as **QUIETING TITLE**.

CODE CITATIONS. Same as **STATUTES OF OREGON**.

CODEFENDANTS.

Duty of Trial Judge to Discharge Codefendants That They May Testify for Defendant on Trial. See **WITNESSES**, 4.

COLLATERAL ATTACK.

Conclusiveness of State and United States Deeds. See **PUBLIC LANDS**, 5.

Effect of Collusive Judgment in Subsequent Suit. See **JUDGMENT**, 1.

COLLUSIVE JUDGMENT.

Effect of in Subsequent Collateral Proceedings. See **JUDGMENT**, 1.

COMMENCEMENT OF ACTIONS. See **LIMITATION OF ACTIONS**.

COMMERCIAL PAPER. Same as **BILLS & NOTES**.

COMMON CARRIERS. Same as **CARRIERS**.

CONCLUSIVENESS.

Questions Settled by Issuance of Patent to Mine. See **MINES**, 2.

CONCURRING NEGLIGENCE.

Law of Liability for Concurrent Carelessness. See **NEGLIGENCE**, 4.

CONJUNCTIVE Charge of Crime. See **INDICTMENT & INFORMATION**, 1.

CONSIDERATION.

Contract Wanting Consideration—Option to Buy. See CONTRACTS, 2.

CONSPIRACY.

Rule Concerning Evidence of Conspirators. See CRIMINAL LAW, 7.

CONSTITUTIONAL LAW.

DISTRIBUTION OF POWERS—DUTY OF COUNTY COURT TO DECLARE RESULT OF LOCAL OPTION ELECTION.

1. The local option act (Laws 1905, pp. 41, 47, c. 2, § 10) in requiring county courts to declare the results of local option elections, is not in violation of Const. Or. Art VII, § 12, providing that county courts shall have probate jurisdiction and "such other duties as may be prescribed by law," for the duty of so declaring the results is one that may properly be imposed by law under the section quoted.

State ex rel. v. Richardson, 309.

POLICE POWER—RIGHT TO LABOR.

2. The property right to labor or employ labor on terms satisfactory to the contracting parties, guaranteed by the fourteenth amendment to the federal constitution, is subject to the limitation of the right of the state, under its police power, to reasonably regulate callings that affect the public health and welfare.

State v. Muller, 252.

POLICE POWER—REGULATING HOURS OF LABOR BY WOMEN.

3. A statute limiting the hours of labor by women to ten per day in certain pursuits is a reasonable exercise of the police power in the interest of national safety.

State v. Muller, 252.

POLICE POWER—REGULATING HOURS OF LABOR BY CHILDREN.

4. Under the police power the state has a very wide discretion in prohibiting child labor, even where there is no danger to morals, decency, life or limb.

State v. Shorey, 397.

ANIMALS RUNNING AT LARGE.

5. Under the general police power a state may prohibit the running at large of stock and compel the owners of such animals to keep them within an enclosure, and may even prohibit the grazing of animals within certain districts.

Reeser v. Umatilla County, 328.

CONSTITUTIONALITY OF LAWS LIMITING RIGHT OF ADULT MALES TO CONTRACT FOR THEIR LABOR.

6. The constitutionality of laws prohibiting the employment of adult males for more than a stated number of hours per day is referred to but not decided.

State v. Shorey, 397.

POLICE POWER—CONTROLLING BUSINESS INJURIOUS TO HEALTH.

7. A permission to conduct any business that may affect public health or morals, either through its inherent nature or the manner in which it shall be carried on, is subject to cancellation at any time under the police power.

Portland v. Cook, 550.

RIGHT TO DELEGATE POLICE POWER TO MUNICIPALITIES—CONSTITUTION.

8. The police power of a state, or a portion of it, may be delegated to a municipal corporation within the state, but neither the state nor its agents can entirely relinquish this attribute of sovereignty.

Portland v. Cook, 550.

PERSONAL RIGHT TO CONTRACT.

9. A statute regulating the hours of child labor or limiting the hours (48th Or.—41)

of employment by women in certain pursuits is not violative of Const. Or. Art. I, § 1, declaring that all men have equal rights.

State v. Muller, 252; *State v. Shorey*, 397.

POLITICAL RIGHTS—GUARANTY OF SUFFRAGE.

10. The Oregon local option act (Laws 1905, pp. 41, 47, c. 2) is not violative of Const. Or. Art. II, § 1, protecting free and equal electoral rights, for no qualified elector is thereby prevented from freely voting at any election or deprived of having his vote counted as cast, so neither freedom nor equality is affected.

State ex rel. v. Richardson, 309.

SAME—PROPERTY QUALIFICATION AT SCHOOL ELECTIONS.

11. Section 3386, B. & C. Comp., providing that any citizen who has property in a school district on which he or she is liable to pay a tax shall be entitled to vote at any school district election, is not invalid as prescribing a property qualification in contravention of Const. Or. Art. II, § 2, defining the qualifications of voters, it not applying to school district elections.

Setterlun v. Keene, 520.

IMPAIRING OBLIGATION OF CONTRACTS—LICENSE BY CITY.

12. An authority by a municipality to conduct a business that either does or may affect public health or morals is not an obligation or contract entitled to constitutional protection against impairment.

Portland v. Cook, 550.

SPECIAL PRIVILEGES—REGULATING HOURS OF LABOR BY WOMEN.

13. A statute forbidding employers to oblige women to work more than a stated number of hours per day is not void under Const. Or. Art. I, § 20, which forbids the granting of special privileges to particular persons.

State v. Muller, 252.

SPECIAL PRIVILEGES OR IMMUNITIES—LOCAL OPTION LAW.

14. The Oregon local option law (Laws 1905, pp. 41, 47, c. 2) is not unconstitutional as in violation of Const. Or. Art. I, § 20, for it does not grant any special privileges or immunities whatever, though it may incidentally deny to some persons the right previously enjoyed of selling liquors as a beverage.

State ex rel. v. Richardson, 309.

DUE PROCESS OF LAW—DEPRIVATION OF RIGHT TO SELL LIQUORS.

15. The privilege of selling intoxicating liquors as a beverage is not a common right of American citizenship protected by the Fourteenth Amendment to the Constitution of the United States.

State ex rel. v. Richardson, 309.

SAME—LIMITING HOURS OF WORK BY WOMEN.

16. A statute forbidding employers to require women to work more than ten hours during a day in any factory, laundry or mechanical establishment, such as Laws 1903, pp. 148, 149, § 1, does not violate the Fourteenth Amendment to the Constitution of the United States, forbidding the taking of life, liberty or property without due process of law.

State v. Muller, 252.

SAME—REGULATION OF CHILD LABOR.

17. The right of the state, under the police power, to regulate parental control of minors, and the right of minors to contract and be contracted with, is not restricted by the Fourteenth Amendment to the Constitution of the United States, forbidding the deprivation of life, liberty or property without due process of law.

State v. Shorey, 396.

SAME—SEIZING PRIVATE PROPERTY FOR PRIVATE USE.

18. That part of Section 400 of the Portland Charter of 1903, providing that where a sale has been declared void and the property shall be resold under a reassessment for public improvements, the entire proceeds shall be paid to the purchaser at the prior sale, is unconstitutional, as providing for a seizure of one man's property to give to another, in violation of Const. Or. Art. I, § 18, which impliedly prohibits the taking of private property for private use at any price. *Gaston v. Portland*, 82.

Constitutional Requirement of Uniformity. See **TAXATION**, 2.

CONSTITUTION OF OREGON.

Article I, § 1, pp. 252, 296, 398.

§ 18, pp. 83, 87.

§ 20, pp. 309, 316.

Article II, § 1, pp. 309, 317.

Article IV, § 1, p. 310.

§ 20, pp. 310, 318.

Article VII, § 12, pp. 310, 318.

Article IX, § 1, pp. 326, 330, 331.

CONSTITUTION OF THE UNITED STATES.

Amendment XIV, pp. 252, 309, 316, 396, 398.

CONTEMPORANEOUS CONSTRUCTION. See **CONTRACTS**, 9.

CONTINUANCE.

POSTPONING TRIAL—DISCRETION—APPEAL.

The trial court acts under a discretion in passing on applications for postponements of trials, and in the present instance the application was wisely refused. *State v. Miste*, 165.

CONTRACTS.

ESSENTIALS—PERMIT TO CONDUCT SLAUGHTERHOUSE.

1. An ordinance granting permission to erect and maintain a slaughterhouse at a specified place within the city limits is not a contract by the municipality with the grantee, even if the latter expends considerable sums of money on the faith of the grant. *Portland v. Cook*, 550.

CONSIDERATION—MUTUALITY.

2. A writing to the effect that A agrees to sell his home to B for a stated sum before a certain date by a sufficient conveyance of the fee is not a contract, as it lacks both consideration and mutuality, but is a mere offer of sale, subject to revocation by the vendor and acceptance by the vendee, if not then withdrawn. *Sprague v. Schotte*, 609.

LEGALITY OF OBJECT—SETTLEMENT OF LITIGATION.

3. A clause in a contract stipulating for the payment of compensation to an attorney for performance of service in prosecuting an action, and providing that the client shall not settle or dismiss the proceeding prior to the rendition of judgment, when the attorney's lien would attach, is against public policy and void. *Jackson v. Stearns*, 25.

RESPECTIVE SITUATIONS OF PARTIES TO ILLEGAL CONTRACTS.

4. All parties to an illegal contract are equally at fault, and none of them have any standing in courts of justice to enforce the contract or to recover any consideration paid under its terms. *Jackson v. Baker*, 155.

CONSTRUCTION—CONCLUSIVENESS OF WAREHOUSEMAN'S LOAD CHECKS.

5. A written receipt, commonly called a "load check," given by a pro-

prietor of a wheat storehouse to persons leaving wheat in store, not showing who the wheat was received from, or its grade, or the terms or time of the deposit, and having some terms of doubtful meaning, manifestly is not conclusive as to the agreement concerning the storing of such wheat, so as to require the rejection of parol evidence on that subject.

Savage v. Salem Mills Co. 1.

SAME—BUILDING CONTRACT—CHANGES.

6. The provision requiring the requests for changes to be in writing was for the protection of the contractor, and he could waive it if he desired.

Enterprise Hotel Co. v. Book, 58.

SAME—PAYMENTS FOR EXTRAS.

7. A provision waiving the exact performance of the terms of a building contract as to payments applies to the payment for extras as well as for the original work.

Enterprise Hotel Co. v. Book, 58.

DUTY OF COURT TO CONSTRUER CONTRACT.

8. Under Section 136, B. & C. Comp., it is the duty of a trial judge to interpret writings to the jury, and the construction of a writing is for the judge.

Baker County v. Huntington, 593.

EFFECT OF CONSTRUCTION BY THE PARTIES.

9. In cases of ambiguity the contemporaneous construction of a contract by the parties thereto is persuasive, but where the meaning is clear, it is the duty of the court to so declare, without reference to the opinion of the parties.

Heywood v. Doernbecher Mfg. Co. 359.

RECOVERING CONSIDERATION OF ILLEGAL CONTRACT.

10. Whatever may be the rule between private persons as to recovering a consideration voluntarily paid on an illegal contract with a knowledge of the facts, the consideration so paid can be recovered by a public corporation that has been imposed upon, whether by its officers or others.

Multnomah County v. White, 183.

LIABILITY FOR MONEY RECEIVED IS AN IMPLIED CONTRACT.

11. The legal liability to repay money received as part payment on a contract that the vendor afterward repudiated is an implied contract for the payment of money within the meaning of B. & C. Comp. § 296, subd. 1.

Hanley v. Combs, 409.

CONVERSION. Same as TROVER.

CORPORATIONS.

AUTHORITY OF DIRECTOR OR STOCKHOLDER AS AGENT.

1. The act or declaration of a director or stockholder of a corporation, acting in his personal capacity, does not bind the corporation, unless he is the agent of the corporation as to that matter, or his conduct is ratified.

Guillaume v. K. S. D. Land Co. 401.

CORPORATE AGENCY—CONDUCT AMOUNTING TO RATIFICATION.

2. The conduct of a corporation in refusing to pay the claim of one with whom it had a contract and defending a suit brought to enforce such claim is a ratification of the act of one of its stockholders or directors in denying liability on the contract.

Guillaume v. K. S. D. Land Co. 401.

COSTS.

TAXATION OF COSTS ON APPEAL.

1. The statute regulating the taxing of costs (B. & C. Comp. § 568) does

not apply to the practice in the supreme court. and there is no statute now (November, 1906) on that subject.

Heywood v. Doernbecher Mfg. Co. 359.

OBJECTIONS TO COSTS ON APPEAL—HEARING BY CLERK.

2. In the absence of a statute regulating the taxing of costs and disbursements on appeal, and no rule of court on that subject having been promulgated, now in November, 1906, the court approves the practice of having all such questions submitted first to the clerk of the supreme court as standing referee, and reviewing his rulings on motion.

Heywood v. Doernbecher Mfg. Co. 359.

PRACTICE IN TAXING COSTS ON APPEAL—VERIFICATION.

3. Although the statutes regulating the taxing of costs in the trial courts (B. & C. Comp. §§ 568, 569) do not apply to the supreme court, still the requirement therein that objections must be verified is a desirable one and is hereby adopted as a matter of practice on appeal.

Heywood v. Doernbecher Mfg. Co. 359.

SUFFICIENCY OF VERIFICATION.

4. A claim for costs is sufficiently verified under Section 568, B. & C. Comp., where it is accompanied by a separate affidavit explaining the claim.

Heywood v. Doernbecher Mfg. Co. 359.

REVIEW OF COSTS CLAIMED IN TRIAL COURT.

5. A claim for the expense of copying the stenographer's notes of a trial to be used by the judge in settling the bill of exceptions is an item connected with the trial and must be passed upon by the lower court and appealed before the supreme court has jurisdiction to consider it.

Heywood v. Doernbecher Mfg. Co. 359.

APPORTIONMENT OF COSTS IN EQUITY.

6. Under Section 566, B. & C. Comp., costs and disbursements may be apportioned in equity cases absolutely against such parties and in such proportions as may seem appropriate.

Livesley v. Helse, 147; *Brown v. Gold Coin Mining Co.* 277; *Kane v. Littlefield*, 299; *Sexton v. McInnis*, 342; *Guillaume v. K. S. D. Land Co.* 401; *Nodine v. Richmond*, 527; *Morton v. Oregon Short Line Ry. Co.* 444; *Baker County v. Huntington*, 593.

COTENANCY.

Purchase by Cotenant—Change of Possession Under Oral Contract—

Part Performance. See **STATUTE OF FRAUDS**, 1, 2.

Effect on Others of Abandonment of Mine by One. See **MINES**, 8.

COUNTIES.

RECOVERING CONSIDERATION OF ILLEGAL CONTRACT.

1. A consideration voluntarily paid on an illegal contract with a knowledge of the facts can be recovered by a public corporation that has been imposed upon, whether by its officers or others.

Multnomah County v. White, 183.

SAME—TAX CERTIFICATES.

2. Where tax certificates belonging to a county were wrongfully transferred in exchange for void county warrants, the fact that the transfer was voluntary and with full knowledge of the facts is not a defense to a claim by the county for an accounting and a return of all money obtained from sales of such warrants to taxpayers for redemption.

Multnomah County v. White, 183.

COUNTY COURT.

Duty to Examine Petition for Local Option Election and Determine Its Sufficiency. See *INTOX. LIQUORS*, 2.

What Constitutes a "Court" Competent to Order a Local Option Election. See *INTOX. LIQUORS*, 3.

Duty of to Order Local Option Election. See *INTOX. LIQUORS*, 2.

Duty of in Declaring Result of Election. See *INTOX. LIQUORS*, 5.

May be Compelled to Declare Result of Vote. See *MANDAMUS*, 3.

What Persons Compose the Court. See *COURTS*, 4.

Probate Proceedings Are Equitable. See *COURTS*, 7.

Power to Control Uncompleted Tree Culture Claim. See *COURTS*, 8.

COUNTY ROADS. Same as HIGHWAYS.**COURTS.****EFFECT OF APPEARANCE ON JURISDICTION OVER SUBJECT-MATTER.**

1. Though one may voluntarily submit to the jurisdiction of a court that could not compel his appearance, he cannot by any act confer on such court jurisdiction over subject-matter since that can be conferred only by law.
Goodnough Mercantile Co. v. Galloway, 239.

BANKRUPTCY—HOW OBJECTION TO JURISDICTION OF STATE COURT MAY BE WAIVED BY TRUSTEE.

2. A trustee in bankruptcy is considered to have waived the objection that a court in which he has been sued has not jurisdiction over the subject-matter of litigation only when he answers to the merits without having suggested the want of jurisdiction.

Goodnough Mercantile Co. v. Galloway, 239.

WAIVER OF OBJECTIONS BY TRUSTEE.

3. In an action against a trustee in bankruptcy, defendant appeared and demurred, challenging the jurisdiction of the state court over the subject-matter. When his demurrer was overruled he sought to answer to secure the property involved for the benefit of the creditors. *Held*, that he did not waive the objection to the jurisdiction.

Goodnough Mercantile Co. v. Galloway, 239.

WHO CONSTITUTE COUNTY COURT—WHAT IS AN ORDER.

4. A "court" is the body of persons designated by statute to sit in the capacity of a court, officially convened at a proper time and place; so, a memorandum signed at their homes separately by the members of the court is not an "order," not being made by the court.

Maraden v. Harlocker, 90.

ORGANIZATION OF COUNTY COURTS—TERMS—VOID ORDERS.

5. The persons designated by statute to compose a county court do not constitute such court for the transaction of county business except when they are in session at a time and place properly and legally determined, and only such orders as are then made are valid.

State ex rel. v. Rhodes, 133.

EXAMPLE OF VOID ORDER BY MEMBERS OF COURT.

6. Where a county judge and a commissioner met at a time not fixed by statute or any order of court, a writing then signed by them is not an order of court, and is void, as those persons did not then compose the county court.

State ex rel. v. Rhodes, 133.

NATURE OF PROBATE PROCEEDINGS.

7. Proceedings in county courts of Oregon, when such courts exercise probate jurisdiction, partake of the form of equity rather than law.

Morrison's Estate, 612.

POWER OF PROBATE COURT TO ORDER MORTGAGE OR SALE OF TIMBER CULTURE CLAIM OF DECEASED CLAIMANT.

8. After the death of a timber culture claimant before he has performed the conditions necessary to obtain title, a probate court has no jurisdiction whatever over the land claimed, and cannot authorize the administrator of the claimant's estate to exercise any control over it for any purpose, and it is not liable for the debts of the estate.

Hawn v. Martin, 304.

SITUATION OF PARTIES TO ILLEGAL CONTRACTS—COURTS.

9. All parties to an illegal contract are equally at fault, and none of them have any standing in courts of justice to enforce the contract or to recover any consideration paid under its terms. *Jackson v. Baker*, 155.

ILLEGAL CONTRACT—DUTY OF COURT TO DISMISS.

10. When it becomes apparent in any way during the legal course of a proceeding that a contract sued on is illegal, the action should be dismissed by the court *sua sponte*, even though the objection be expressly waived, the courts being bound not to permit the forms of justice to be used thus for an improper purpose. *Jackson v. Baker*, 155.

DUTY TO CONSTRUE WRITINGS.

11. It is the duty of a court to declare the true meaning of a writing received as evidence, regardless of how the parties thereto may have construed it.

Heywood v. Doernbecher Mfg. Co. 359.

What Constitutes a Court Competent to Order a Local Option Election

Under Law of 1905. See INTOXICATING LIQUORS.

Example of Memorandum Not a Court Order. See COURTS, 7.

Right of Supreme Court to Reduce Excessive Verdict. See APPEAL, 36.

CRIMINAL LAW.

CHANGING VENUE—DISCRETION.

1. An application for a change of venue under Section 1250, B. & C. Comp., is addressed to the discretion of the trial court, and its ruling thereon is reviewable on appeal only for an erroneous exercise of its power resulting in a substantial injury to the defendant, which was not the case here. *State v. Mists*, 165.

RELEVANCY—INCIDENTAL EVIDENCE OF OTHER CRIMES.

2. Evidence of other offenses than the one charged is not on that ground incompetent if it is sufficiently connected with the charge under investigation, the jury being properly instructed as to the purpose for which it may be considered. *State v. White*, 416.

RELEVANCY—THREATS BY THIRD PERSON.

3. In doubtful cases evidence of threats by one of several persons acting under a general plan is admissible for the purpose of showing the feelings of the conspirators, and aiding the ascertainment of truth from the conflicting claims, when the threats are reasonably connected in time and circumstance with the principal event; but evidence of threats made by a third person against the prosecuting witness cannot be imputed to de-

defendant, though made in his presence, unless some concert of purpose is shown between such third person and defendant. *State v. Quen*, 347.

DECLARATIONS OF THIRD PERSONS—HEARSAY.

4. In a criminal case testimony that a third person said he had committed the crime charged against defendant is incompetent, being hearsay. *State v. Jennings*, 483.

STATEMENT BY DEFENDANT AS EVIDENCE.

5. A statement made by a witness called under Section 1261, B. & C. Comp., to testify before a district attorney sitting as a grand jury, is competent evidence though it is not complete, if the witness admits that it is correct as far as it goes. *State v. Jennings*, 483.

SAME—INCONSISTENT STATEMENTS.

6. Declarations of defendant concerning the commission of the crime charged are admissible against him, to prove that he has made false or inconsistent statements regarding the crime, when followed by evidence of their falsity or inconsistency. *State v. Jennings*, 483.

EVIDENCE OF CO-CONSPIRATORS—COMPETENCY—PROOF OF CONSPIRACY.

7. Evidence of acts done by alleged conspirators in pursuance of the alleged conspiracy may be admitted before the existence of such unlawful agreement is entirely established, the order of proof being in the discretion of the trial judge. If the judge shall finally consider the showing as to the conspiracy insufficient, he should strike out the evidence of specific acts and instruct the jury to disregard it. *State v. White*, 416.

OPINION EVIDENCE.

8. A witness who has been a practicing physician and surgeon for seventeen years, and who has described a person's bodily condition, may give his opinion as an expert as to the cause of such condition. *State v. White*, 416.

PROPRIETY OF OPINION.

9. A witness who saw the surroundings soon after a homicide by shooting should not be allowed to state his opinion as to the place from which the bullet came, where the conditions observed can be adequately described. *State v. Jennings*, 483.

DUTY TO INSTRUCT AS TO INFERENCE JUSTIFIED BY FAILURE OF CO-DEFENDANT TO TESTIFY.

10. It is not obligatory on a trial judge, under Section 1397, B. & C. Comp., to instruct a jury in a criminal case that no unfavorable inference is to be drawn from the fact that a codefendant not on trial fails to testify for the defendant. *State v. White*, 416.

See INDICTMENT, JURY, KIDNAPPING, PERJURY, RIOT, WITNESSES.

CURING DEFECTS IN PLEADING.

Supplying Omitted Allegations by Answer. See PLEADING, 5.
Scope of Doctrine of Aider by Verdict. See PLEADING, 17, 18.

CUSTOM AND USAGE.

CUSTOM AND USAGE AS PART OF CONTRACTS.

1. In the absence of an agreement to the contrary, the usage or custom of a particular business enters into and forms a part of a contract made by a person engaged in that business, and other persons dealing with him with knowledge of that custom, but proof of custom or usage is never admissible to give an interpretation to a contract inconsistent with its language. *Savage v. Salem Mills Co.* 1.

SAME—CASE UNDER CONSIDERATION.

2. Where wheat was delivered to and received by a milling company in pursuance of a custom known to both parties and with reference to which they contracted for the company to mix all wheat delivered to it with that belonging to it in one common mass, first refusal of the wheat being reserved by the company, and thereafter at its own convenience and pleasure and without any written authority to ship out any of the common mass or grind it into flour and other mill products, the custom entered into and became a part of the contract between the parties.

Savage v. Salem Mills Co. 1.

Pleading Local Custom of Appropriation. See **WATERS**, 1.

DAMAGES.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO SELL.

1. In action of damages by a purchaser against a seller for refusing to deliver the property contracted for, the measure of damages is the value of the property at the time of the refusal, less the agreed price to be paid, with interest, which is here an element of damage.

Livesley v. Johnston, 40.

SAME—ANOTHER CASE.

2. The measure of damages for the breach of a contract to sell is the difference between the purchase price and the market price on the date of delivery.

Livesley v. Hesse, 147.

SAME—ANOTHER CASE.

3. Where a seller delivers goods not of the kind or quality agreed upon, but they are accepted, the measure of the buyer's damages is the difference in value between the goods ordered and those delivered.

Mine Supply Co. v. Columbia Mining Co. 391.

TROVER—MEASURE OF DAMAGES—COMPETENT EVIDENCE.

4. The value of property at the time of its conversion is the measure of damages in trover, but evidence as to the value a reasonable time before and after that date is competent.

Austin v. Vanderbilt, 206.

MEASURE OF DAMAGES AWARDED IN LIEU OF SPECIFIC PERFORMANCE OF CONTRACT TO SELL.

5. Where damages are awarded in place of a decree for specific performance of a contract to sell, the proper amount is what plaintiff would have been entitled to in a law action for damages for breaching the contract.

Livesley v. Johnston, 40.

SALES—BREACH OF WARRANTY—ELEMENTS OF DAMAGE.

6. In case of a breach of a contract to furnish a specified kind of mill for reducing ores, where the mill has been retained, the buyer may recover as damages the expense incurred in testing the mill, the freight paid on imperfect parts that were not used, the cost of providing new parts necessary to make the mill conform to the contract, if the seller refuses or neglects to furnish them, the value of gold lost while testing the machinery, and the amount of wages paid the employees while idle on account of the defective mill.

Mine Supply Co. v. Columbia Mining Co. 391.

SAME—INTEREST AS DAMAGE.

7. In cases of breach by seller of contract to sell chattels, interest may be allowed on the amount of damage as an additional element.

Livesley v. Johnston, 40.

DAMS.

Interference With Flow of Debris—Injunction. See **NUISANCE**, 1.

DANGER.

Effect of Knowledge of Assumed Risk. See **MASTER & SERVANT**, 4, 5.

DARKNESS.

Time of Tendering Chattels for Examination. See **SALES**, 17.

DAYLIGHT.

Need of Tendering Articles for Examination. See **SALES**, 17.

DEBRIS.

Right to Enjoin Deposit of Destructive Matter. See **MINES**, 1.

Enjoining Interference With Floating of Debris. See **MINES**, 1.

DECEDENTS' ESTATES. Same as **EXECUTORS & ADMINISTRATORS**.

DEDICATION.

Loss of Streets by Neglect to Open and Use. See **MUNIC. CORP.** 6.

DEEDS.

PRESUMPTION OF DELIVERY—BURDEN OF PROOF.

1. The possession of an executed deed by the grantee named therein creates a presumption of its regular delivery, and one asserting the contrary has the burden of proving such claim. *Pierson v. Fisher*, 223.

ACTS AMOUNTING TO DELIVERY.

2. Delivery of a deed is accomplished when the grantor voluntarily passes it to the grantee, or some one for him, or when the grantor does or says something that discloses unmistakably an intent to finally part with all control over the instrument. *Pierson v. Fisher*, 223.

MENTAL CAPACITY OF GRANTOR.

3. The evidence here does not show such a state of the grantor's mind as to render her incompetent to execute the deed in question, though she was much depressed by the death of her children and her domestic disagreements, and was hysterical and incoherent at times. This conclusion is partly influenced by the fact that competent medical witnesses who attended her about the time in question were not called.

Hamilton v. Holmes, 453.

See, also, **CANCELLATION OF INSTRUMENTS**.

DEFAULT

In payment of Purchase Price Under Contract Where Purchaser Has Taken Possession—Effect of. See **VEND. & PUR.** 8.

Order Vacating Default Not Appealable. See **APPEAL**, 3.

DEFINITIONS. Same as **WORDS & PHRASES**.

DEHORS EVIDENCE.

Evidence Outside the Record Affecting Dismissal. See **APPEAL**, 22.

DELEGATION OF POWER.

Right to Confer Measure of Police Power on Cities. **MUNIC. CORP.** 1.

DELIVERY.

Payment and Delivery as Concurrent Acts. See **SALES**, 18.

Need of Tendering Goods by Daylight. See **SALES**, 17.

Presence of Seller Necessary to Completeness. See **SALES**, 4.

Not Necessary to Validity of Government Patent. **PUBLIC LANDS**, 4.

Deeds—Acts Amounting to Delivery. See **DEEDS**, 2.

Presumption as to Deed Held by Grantee. See **DEEDS**, 1.

DEMURRER.

Certiorari—Pleading Permitted by Defendant. See WRIT OF REVIEW, 2.
 Waiver by Pleading Over After Demurring. See PLEADING, 19.

DENIALS.

Denial of "Material" Allegations—Sufficiency of. See PLEADING, 7.
 Trover—Allegations and Proofs—Pleadings. See TROVER, 1, 3, 4.

DEPOSITIONS.

EFFECT OF MISDESCRIBING SPECIAL REFEREE.

Where depositions have been taken before a specified referee, they should not be suppressed because he was a different official than he was supposed to be, as, where he was described as a notary public in the order of appointment, though he was in fact a United States commissioner.
Owings v. Turner, 462.

DEPOT GROUNDS.

Extent of Territory Comprising Station Grounds. See RAILROADS, 8.

DISBURSEMENTS. Same as COSTS.**DISCRETION.**

Amendment in Mandamus Cases and After Reversal. MANDAMUS, 1, 2.
 Supreme Court—Provisions of Remandment in Equity. See APPEAL, 39.
 Power of Trial Courts to Permit Amendments to Pleadings in Law Actions After Remandment. See APPEAL, 37, 38.
 Continuance—Granting Motion. See APPEAL, 28.
 In Cases of Injunction—Relative Amounts of Injury. INJUNCTIONS, 2, 3.

DISJUNCTIVE Charge of Crime. See INDICTMENT, 1.**DISMISSAL AND NONSUIT.**

ILLEGAL CONTRACT—COURTS—DUTY TO DISMISS.

When it becomes apparent in any way during the legal course of a proceeding that a contract sued on is illegal, the action should be dismissed by the court *sua sponte*, even though the objection be expressly waived, the courts being bound not to permit the forms of justice to be used thus for an improper purpose.
Jackson v. Baker, 155.

DISMISSING APPEAL.

Evidence Outside the Record to Sustain Motion. See APPEAL, 22.
 Remedy Where Evidence is Newly Discovered. See APPEAL, 20.
 Propriety of Delaying Decision Involving Merits. See APPEAL, 21.

DOCKETS.

Effect on Judgment of Failure to Docket. See JUDGMENT, 6.
 Legal Effect of Properly Docketing Judgment. See JUDGMENT, 3.

DOMICILE.

DOMICILE CONSIDERED.

1. The meaning of the word "domicile" considered. *Reed's Will*, 500.

DOMICILE—PRESUMPTION AS TO CHANGE—BURDEN OF PROOF.

2. A domicile once shown to have existed at a particular place is presumed to remain there, and the burden of proof is on the one claiming it to have been changed.
Reed's Will, 500.

DOMICILE—RESIDENCE—INTENT TO REMAIN.

3. Residence is a fact to be considered in determining the place of

domicile, but domicile cannot exist at a particular place without residence and an intent to remain there. *Reed's Will*, 500.

CHANGE OF DOMICILE.

4. Within the established rule as to the concurrence of events necessary to constitute a change of domicile, it must be held that Amanda Reed did not change her domicile from Oregon to California, though she did have a temporary residence in the latter state for several years.

Reed's Will, 500.

VALUE OF STATEMENTS AS TO INTENTION OF RESIDENCE.

5. Casual statements as to the intent accompanying one's change of residence are of less value as evidence than deliberate business declarations or avowals to intimate friends and to relatives.

Reed's Will, 500.

DUE PROCESS OF LAW.

Regulating Hours of Labor by Children. See CONST. LAW, 17.

Deprivation of Right to Sell Liquors. See CONST. LAW, 15.

Limiting Hours of Work by Women. See CONST. LAW, 16.

Seizing Private Property for Private Use. See CONST. LAW, 18.

DUPLICATE

Denials That Are Already Pleaded May be Stricken Out. APPEAL, 5.

Matters Denied Need Not be Affirmatively Alleged. See PLEADING, 10.

DUPLICITY in Charging Crime. See INDICTMENT, 1.

EJECTMENT.

RIGHT TO POSSESSION AS A DEFENSE.

A plaintiff in an ejectment action being required to show right to possession as well as title, any matter tending to show that defendant is not wrongfully in possession is a defense, whether the right asserted be legal or equitable, as, for instance, that defendant is holding under an executory contract of sale as to which he is not in default.

Coles v. Meskimen, 54.

ELECTIONS.

REQUIREMENT OF NOTICE.

1. Electors are bound to take notice of elections regularly occurring in a prescribed manner according to law, and proclamations and other notices are not absolutely necessary; but in the cases of special elections at uncertain times or on particular subjects, all statutory provisions as to notice are mandatory.

Marsden v. Harlocker, 90.

NOT INVOLVING OFFICE—EQUITABLE JURISDICTION.

2. Equity courts have jurisdiction to determine the legality of an election not involving an office, where no method of contest is provided by statute.

Marsden v. Harlocker, 90.

See INTOXICATING LIQUORS, 1-5; SCHOOLS, 1-2.

EMANCIPATION.

Liability of Earnings of Child Not Under Control of Parents to Debts of Father. See PARENT & CHILD.

EQUAL PROTECTION OF THE LAWS. See CONSTITUTIONAL LAW, 9.

EQUITY.

ELECTIONS NOT INVOLVING OFFICE—EQUITABLE JURISDICTION.

1. Equity courts have jurisdiction to determine the legality of an elec-

tion not involving an office, where no method of contest is provided by statute.
Marsden v. Harlocker, 90.

JURISDICTION OF EQUITY OVER POLITICAL QUESTIONS.

2. Equity will not undertake to control public officers in the discharge of political duties unconnected with rights of property.

State ex rel. v. Dunbar, 109.

SAME—ILLUSTRATION.

3. An injunction will not issue to restrain the Secretary of State from printing on the ballots for an election the title of a proposed act in certain specified terms, the duty of the Secretary being entirely political and not involving property rights of any kind.

State ex rel. v. Dunbar, 109.

JURISDICTION TO AWARD PERFORMANCE OR DAMAGES.

4. Where the defendants in a suit for the specific performance of a contract of sale dispose of the property during the pendency of the suit, equity may retain jurisdiction and award the plaintiff damages in lieu of the article contracted to be delivered.

Livesley v. Johnston, 40.

SCOPE OF POWER—MERGER.

5. Mergers are not favorites of equity and conflicting interests will not be considered united, in the absence of an expressed intention, where justice will be promoted by keeping them separate.

Katz v. Obenchain, 352.

EFFECT OF GENERAL PRAYER FOR RELIEF.

6. In entering a final decree a court of equity may grant all the relief proper to be awarded under the facts proved and the law applicable thereto, under a prayer for general relief, regardless of the specific prayers.

Katz v. Obenchain, 352.

Amendment After Remandment. See APPEAL, 37-41.

Costs and Disbursements in Equity. See COSTS, 6.

ESTATES

Of Decedents. See EXECUTORS & ADMINISTRATORS.

Of Insolvents. See BANKRUPTCY.

ESTOPPEL.

ESTOPPEL TO DENY A RIGHT BY ONE WHO EXERCISED IT.

1. One who has exercised a right conferred by another will not be heard to deny that such grantor had the right in question.

Multnomah County v. White, 183.

SAME—CASE UNDER CONSIDERATION.

2. One who has collected money from various property owners for certain tax certificates cannot insist that they were void when called upon to account to the true owner, who claimed that they had been unlawfully obtained from its possession.

Multnomah County v. White, 183.

ESTATES SUBSEQUENTLY ACQUIRED.

3. A street having been dedicated but not opened over rough ground, whereby uncertainty existed as to the lines, and a purchaser in the tract having in good faith placed valuable improvements on part of the street adjoining his lots, which were undisturbed for thirteen years, and the removal of which would appreciably injure the lots, the city ought to be equitably estopped now from claiming that part of the street so improved.

Oliver v. Synhorst, 292.

ELEMENTS OF EQUITABLE ESTOPPEL.

4. To justify the application of the rule estopping the owner of land from disputing the title of a purchaser thereof from another, it must appear that the true owner either encouraged such purchase or by his gross negligence in not declaring his rights induced the purchaser to change his position, in ignorance of the truth and to his damage.

Hawn v. Martin, 304.

CASE UNDER CONSIDERATION.

5. A timber culture claimant died before performing the conditions precedent to obtaining title from the government. A county court authorized the administrator to mortgage the land to secure money for the purpose of purchasing the same from the government. Afterwards the county court authorized a sale of the property to pay the mortgage and other indebtedness of the estate of the decedent. The heir did not object to the sale, after being cited by publication, and it was not claimed that he ever had any actual notice of the sale or in any way except by silence and absence, induced the purchaser to buy at the administrator's sale. He did, however, refuse to pay the mortgage, and has not offered to redeem from the sale, though not under age. *Held*, that the heir was not estopped from asserting title to the claim as against the purchaser at the administrator's sale.

Hawn v. Martin, 304.

ESTOPPEL BY ABANDONMENT.

6. Where the persons in possession of a mining claim were experienced miners and familiar with the usual methods of marking the boundaries of mining claims, with which a subsequent adjoining locator was not familiar, and for many months saw such subsequent locator working on an adjoining claim without objection until he had expended a large sum of money and discovered valuable ore, when they claimed that he was trespassing on their prior location, are equitably estopped from maintaining such claim on the ground that they abandoned that part of the prior location overlapped by the subsequent locator, the means of information not being equal.

Sharkey v. Candiani, 112.

EQUITABLE ESTOPPEL BY TACIT ACQUIESCENCE.

7. That plaintiff was employed by defendant about its quartzmill, and knew it was being constructed to reduce ores, and made no immediate objection to defendant's plan for the dumping of tailings into a stream by which plaintiff's farm was irrigated, is not sufficient to constitute an equitable estoppel, precluding plaintiff from thereafter maintaining a suit to restrain such deposit, as the relation of master and servant does not constitute such a joint participation in a joint enterprise as to support an estoppel.

Brown v. Gold Coin Mining Co., 278.

SUFFICIENCY OF PLEA.

8. In pleading an estoppel the facts relied on must be stated with particularity, nothing being left to inference, and it must further appear that the party pleading the estoppel relied on the facts stated, believing them to be true, and that he will be prejudiced in a stated way if they are disproved.

Hawn v. Martin, 304.

See LANDLORD & TENANT, 2.

EVIDENCE.

JUDICIAL NOTICE OF PRIOR HEARING.

1. Courts will take judicial notice of information acquired at previous hearings of the same cause, whether on the present or prior appeal.

State ex rel. v. Richardson, 309.

JUDICIAL NOTICE OF LOCAL CUSTOM.

2. In the case of a water appropriation on the public domain claimed under the act of Congress of July 26, 1866 (14 Stat. U. S. 253, c. 262, § 9), it is not necessary to offer evidence of local custom, as the right and method of appropriation was so universal that the courts know it by judicial notice.

Parkersville Drainage District v. Wattier, 332.

JUDICIAL NOTICE OF OPERATION OF LAWS OF NATURE.

3. Courts will take judicial notice of the effect of the waters of a stream during a flood turned nearly at right angles against the land of a riparian proprietor, such effect being dependent on the laws of nature.

Morton v. Oregon Short Line Ry. Co. 444.

PRESUMPTION AS TO KNOWLEDGE OF A STATED BUSINESS BY A PERSON WHO ENGAGES THEREIN.

4. Generally, a person who engages in a business is presumed to be reasonably familiar with the manner of conducting it, as, a timber locator is supposed to know the corners and lines of tracts that he undertakes to exhibit to prospective purchasers, and the jury may properly be so instructed.

Kabat v. Moore, 191.

PRESUMPTION AS TO ACTS OF COURT OFFICER.

5. It must be assumed, in the absence of any evidence, that a trustee in bankruptcy immediately took possession of the property of the bankrupt.

Goodnough Mercantile Co. v. Galloway, 239.

COMPETENCY OF PRIVATE LETTER.

6. A letter forming part of a correspondence between the parties to an action and concerning the subject-matter in dispute is competent evidence, being on the same footing as a conversation.

Frame v. Oregon Liquor Co. 272.

COMPETENCY—RES INTER ALIOS ACTA.

7. Evidence of transactions between a seller of property and a third person concerning the subject of sale, not in the presence or hearing of the buyer, are not competent evidence against him, being acts between strangers by which he ought not to be injured.

Hanley v. Combs, 409.

BEST EVIDENCE.

8. By admitting that a writing offered in evidence is a correct copy of a public record, the requirement of the original or a certified copy is waived.

First National Bank v. Miller, 587.

LETTER BY ATTORNEY AS AN ADMISSION AGAINST INTEREST.

9. A letter written by an attorney to the adverse party concerning his client's interests in dispute cannot be considered as more than an admission against interest, the value of which is a question for the jury.

Kabat v. Moore, 191.

HEARSAY EVIDENCE.

10. The statement by a public official that he did not perform a certain act, but that the records of his office show such act to have been performed, is hearsay.

Goodnough Mercantile Co. v. Galloway, 239.

PAROL EVIDENCE—WRITTEN INSTRUMENT—SILENCE OR AMBIGUITY.

11. Where a receipt is issued by a warehouseman and accepted by the owner of goods stored as containing the terms and conditions upon which the commodity is delivered and received, it becomes a contract between the parties, and cannot be contradicted or varied by parol testimony.

Savage v. Salem Mills. Co. 1.

SAME—CASE UNDER CONSIDERATION.

12. Where a memorandum is silent as to the terms of the contract, or when its language is ambiguous or uncertain, its terms or its meaning may be shown by parol, and it may be interpreted in the light of surrounding circumstances. *Savage v. Salem Mills Co.* 1.

PAROL EVIDENCE—AMBIGUITY.

13. A statement in an assignment of a judgment that the assignor appoints the grantee its irrevocable attorney with power of substitution creates a doubt as to the intent of the assignment, rendering the instrument ambiguous and tending to show that the transfer was made for some purpose without designing to vest an interest in the assignee, so that it is permissible for the assignor to testify what interest was intended to be conveyed. *First National Bank v. Miller*, 587.

COMPETENCY OF EXPERTS.

14. One who has been a practicing physician and surgeon for 17 years, and who has described a person's bodily condition, may give his opinion as an expert as to the cause of such condition. *State v. White*, 416.

OPINION EVIDENCE—CONCLUSIONS.

15. Where the facts observed by a witness can be accurately stated to a jury, the evidence should be limited to such a recital and the witness should not be permitted to state his deductions from such facts. *State v. Jennings*, 483.

EXCESSIVE DAMAGES.

Right of Supreme Court to Reduce Verdict. See APPEAL, 36.

EXECUTION.

EFFECT OF NOT DOCKETING.

1. An execution regularly issued on a valid judgment is not affected by the fact that the judgment was never docketed. *Katz v. Obenchain*, 352.

EXECUTION SALE—EVIDENCE OF INADEQUACY OF PRICE.

2. Where land sold on execution was sold some time later for very little more than the purchase price, and after a dispute existing at the time of the sale as to riparian claims had been settled in favor of the lands, no such inadequacy is shown as to warrant a setting aside of the sale. *Nodine v. Richmond*, 527.

INADEQUACY OF PRICE AS EVIDENCE OF FRAUD.

3. Mere inadequacy of price on an execution sale, where the parties stand on an equal footing, and where there are no confidential relations between them, is insufficient to set aside the sale, unless the inadequacy is so gross as to amount to proof of fraud or to shock the conscience. *Nodine v. Richmond*, 527.

EXECUTION SALE—EVIDENCE OF INADEQUACY OF PRICE.

4. A review of the evidence as to the value of the Nodine land transferred by him to trustees and afterward sold on execution under prior liens, does not show that the sales were made for an inadequate price. *Nodine v. Richmond*, 527.

EXECUTION SALE—EVIDENCE OF CHILLED BIDDING.

5. The fact that, while property was being offered for sale under execution in favor of a bank, an officer of the bank told one who made a bid that the lands were being sold subject to mortgages thereon, whereupon the bidder went away and the officer purchased, does not show the

preventing of competitive bidding so as to warrant the setting aside of the sale where the representation was true. *Nodine v. Richmond*, 527.

WAIVER OF JUDGMENT LIEN BY NONENFORCEMENT.

6. In the absence of a showing of authority or intent a direction of an attorney to an officer not to sell under an execution writ certain real property on which his client had a lien cannot be considered a waiver of the lien. *Katz v. Obenchain*, 352.

EXECUTORS AND ADMINISTRATORS.

RIGHT OF EXECUTOR OF TIMBER CULTURE CLAIMANT.

1. The executor of the estate of a timber culture claimant has no right to or interest in the land entered by the deceased, as all rights of the claimant ended with his death. Neither representatives nor heirs have any rights through the deceased. *Warner Valley Stock Co. v. Morrow*, 258.

POWER OF PROBATE COURT TO MORTGAGE OR SELL TIMBER CLAIM.

2. After the death of a timber culture claimant before he has performed the conditions necessary to obtain title, a probate court has no jurisdiction whatever over the land claimed, and cannot authorize the administrator of the claimant's estate to exercise any control over it for any purpose, and it is not liable for the debts of the estate. *Hawn v. Martin*, 304.

PROBATE—PETITION AS COMPLAINT—WAIVER BY ANSWERING.

3. In a probate proceeding to require an executor to file a final report the petition is to be treated as a complaint, and fatal defects therein are not waived by answering, the practice being the same as prescribed by Section 72, B. & C. Comp., for civil cases. *Morrison's Estate*, 612.

PETITION FOR ORDER DIRECTING FINAL ACCOUNT.

4. A petition for an order requiring an executor or an administrator to file a final account must show that the estate is "fully administered," as stated in Section 1202, B. & C. Comp., or is ready for final settlement. *Morrison's Estate*, 612.

SUFFICIENCY OF PETITION—DUTY TO COLLECT ASSETS.

5. A petition by part of the heirs interested in an estate asking that the executor be directed to file a final report, in which it appears that the executor still has in his hands several notes, some of which are not due and others of which are of uncertain if any value, but it does not appear that the distributees have agreed to any distribution or disposal of the assets on hand is fatally defective, for the property on hand is incapable of ratable distribution, and should be reduced to money by the executor. *Morrison's Estate*, 612.

EXHIBITS.

Writ of Review—Practice in Pleading. See WRIT OF REVIEW, 1.

EXPERT WITNESS.

Example of Sufficient Qualification. See EVIDENCE, 14.

FEMALES.

Right to Regulate Hours of Labor by. See CONST. LAW, 16.

FINAL ORDER.

Order Opening Default Not Final. See APPEAL, 3.

FINDINGS OF FACT.

Conclusiveness of Findings of Judge on Appeal. See APPEAL, 29.
(48th Or.—42)

FORFEITURE.

Bond for Deed—Right to Cancel Without Notice. See **VEND. & PUR. 7.**
Equity Will Seldom Enforce Strict Foreclosure. See **VEND. & PUR. 1.**
Vendor Must Himself be Able to Perform. See **VEND. & PUR. 4, 5.**

FORMER ADJUDICATION.

Effect of Decree in Collusive Suit. See **JUDGMENT, 1.**
Parties Concluded by Final Order. See **JUDGMENT, 2.**

FRAUD.**CONCLUSIVENESS OF ORAL TESTIMONY.**

Fraud is a matter of deduction from all the testimony, and in its determination the jury is not bound by the number of witnesses on either side or the positiveness of their statements. *Kabat v. Moore, 191.*

See, also, **CANCELLATION OF INSTRUMENTS.**

FRAUDS, STATUTE OF. Same as **STATUTE OF FRAUDS.**

FRAUDULENT CONVEYANCES.**PARTICIPATION OF GRANTEE.**

1. In suits to prevent the consummation of a fraud on plaintiff by transferring property in which he is interested, it must appear that the grantee participated in the fraudulent intent. *Livesley v. Heise, 147.*

RELATIVES—BURDEN OF PROOF.

2. Where conveyances are made to near relatives, the effect of which is to prevent creditors from satisfying their claims, the burden of proving good faith is on the grantees. *Livesley v. Heise, 147.*

FREE ELECTIONS.

Local Option Law of 1905 Does Not Affect. See **INTOX. LIQUORS, 10.**

GENERAL DENIAL.

Denial of "Material" Allegations—Sufficiency. See **PLEADING, 7.**

GOVERNMENT LANDS. Same as **PUBLIC LANDS.**

GRAZING.

Prohibiting Grazing in Prescribed Districts. See **ANIMALS, 1.**
Charging for Grazing Privilege—Police Power. See **ANIMALS, 2.**

HARMLESS ERROR.

Excluding Evidence Cured by Subsequent Admission of Other Evidence Covering the Same Point. See **APPEAL, 30-35.**

HEALTH.**REGULATION OF SLAUGHTERHOUSES UNDER POLICE POWER.**

Though the conducting of a slaughterhouse is a legitimate business, and may have been properly authorized, it may, nevertheless, become so inappropriate or offensive through changes in the surroundings of the place where it is situated that it may be stopped at that location.

Portland v. Cook, 550.

Control of Business Under Police Power. See **CONST. LAW, 7.**

HEARSAY Evidence. See **EVIDENCE, 10.**

HIGHWAYS.**ESTABLISHMENT OF HIGHWAYS—ADOPTION OF REPORT OF VIEWERS.**

1. Under a statute directing that the report of viewers appointed to

lay out a proposed county road and assess the resulting damages shall be "adopted" by the county court (Laws 1903, pp. 262, 267, §15), an order that the report be "approved" is sufficient, as the two words are practically synonyms. *Miller v. Union County*, 266.

ESTABLISHING HIGHWAYS—FINALITY OF ORDER ASSESSING DAMAGES.

2. Under a statute providing for a board to assess the damages resulting from the opening of a proposed county road, and giving the county court power to order the damages paid by the county or by the petitioners, and to order the road opened (Laws 1903, pp. 262, 264, §11), the order assessing the damages is a final order that may be appealed from, though the order declaring the road a public highway may not be entered until later. *Miller v. Union County*, 266.

DUTY OF VIEWERS—PETITION AND ORDER.

3. Under Laws 1903, pp. 262, 269, §§20 and 21, providing for the opening of roads or gateways to isolated residences, the petitioner must ask for one or the other, but the county court must decide which one is appropriate, and the viewers must view the easement ordered—the discretion as to nature of the easement rests with the court and not with the viewers. *Shannon v. Malheur County Court*, 617.

Loss of Road by Nonuser. See *ESTOPPEL*, 3.

HOMESTEAD.

Validity of Contract to Convey Before Obtaining Title From Government—Public Policy. See *PUBLIC LANDS*, 2.

HOPS.

Advances—Recalling Money—Intent to Buy. See *SPEC. PERF.* 6.

Need of Offering by Daylight to be Examined. See *SALES*, 17.

HOSPITALS.

Rights Acquired by Paying Hospital Dues Under Compulsion Without Special Contract. See *MASTER & SERVANT*, 6.

ILLEGAL CONTRACTS.

Rights of Private Parties in Courts of Justice. See *CONTRACTS*, 4.

Right of Public Corporation to Recover Under. See *COUNTIES*, 1.

IMMUNITIES.

Local Option Law Does Not Confer Special Rights. *CONST. LAW*, 14.

IMPEACHMENT.

Example of Improper Attack on Witness. See *WITNESSES*, 1.

Attacking One's Own Witness. See *WITNESSES*, 2.

IMPLIED CONTRACT for Direct Payment of Money. *ATTACHMENT*, 4.

IMPLIED REPEAL by Subsequent Act. See *STATUTES*, 3, 4.

IMPLIED WARRANTY.

Explanation of Doctrine of Warranty by Implication. See *SALES*, 9, 10.

INADEQUACY.

Judicial Sale—Adequacy of Price—Fraud. See *EXECUTION*, 3.

INDICTMENT AND INFORMATION.

WHEN CONJUNCTIVE CHARGE IS DUPLICITOUS.

1. The rule is settled in Oregon that acts disjunctively forbidden by

a statute may be conjunctively charged in an indictment, unless they are repugnant to each other. *State v. White*, 416.

CONSTRUCTION OF INDICTMENTS.

2. An indictment is sufficient if it contains all the necessary averments directly stated or by fair inference, and is not bad because such statements must be separated from superfluous matters inappropriately added. *State v. Jewett*, 577.

INFANTS.

CONTROLLING HOURS OF LABOR UNDER POLICE POWER.

It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best interest, although the prohibited employment does not involve a direct danger to morals, decency, life or limb. *State v. Shorey*, 397.

INFORMATION. Same as INDICTMENT.

INITIATIVE ACT.

Title of is Subject to Constitutional Requirements. See STATUTES, 1.

INJUNCTION.

ENJOINING FRAUDULENT DISMISSAL OF LEGAL PROCEEDING.

1. An attorney is not entitled to enjoin his client from dismissing a proceeding in which such attorney has a contingent interest under a contract, even though the intended dismissal is collusive and for the purpose of defrauding the attorney of his fees. *Jackson v. Stearns*, 25.

DISCRETION.

2. Under the facts as disclosed here a court of equity ought not to enjoin the defendant from using the small amount of water that he needs. *Mann v. Parker*, 321.

DISCRETION—ADEQUATE REMEDY AT LAW.

3. Where the injury, if any, sustained by plaintiff through the diversion of a certain amount of water from a stream by defendant, will be hardly appreciable in comparison with the heavy damage suffered by defendant if the diversion shall be enjoined, and it does not appear that defendant is unable to respond in damages for the injury, an injunction should not be issued. *Mann v. Parker*, 321.

SAME—CASE UNDER CONSIDERATION.

4. Where a husband signed certain notes for the accommodation of his wife, who thereafter died, leaving an estate sufficient to pay them, the husband is not entitled to an injunction restraining the holder from pursuing him, instead of filing the notes as a claim against the wife's estate; the husband having an adequate remedy at law by himself paying the notes to the holder and filing them against the wife's estate. *White v. Savage*, 604.

See MINES, 1; WATERS, 20.

INSTRUCTIONS TO JURIES.

Charge Must be Considered as a Whole. See TRIAL, 3.

Example of Charge Not Assuming Facts. See OFFICERS, 3.

Special Limitations Must be Requested. See TRIAL, 6.

INTEREST.

INTEREST AFTER DEMAND.

1. Under a contract for the sale of property to be paid for on demand.

interest begins to run from the time such demand is made, under Section 4595, B. & C. Comp., providing for interest on money after it becomes due.

Savage v. Salem Mills Co. 1.

INTEREST ON UNSETTLED SUM BEFORE JUDGMENT.

2. Under Section 4595, B. & C. Comp., allowing interest on moneys after the same become due, interest cannot be allowed on a disputed claim until judgment is rendered, whether the dispute be as to the fact of liability or only as to the amount.

Baker County v. Huntington, 593.

SAME—CASE UNDER CONSIDERATION.

3. Where the sureties on a sheriff's bond controverted their liability for his default, though acknowledging the extent of his defalcation, interest is not allowable on the demand against them until its liquidation by judgment.

Baker County v. Huntington, 593.

AS AN ELEMENT OF DAMAGES—CONTRACT TO SELL.

4. In an action of damages for refusing to deliver property contracted to be sold, interest on the sum constituting the measure of recovery is allowable as an additional element of damage.

Livesley v. Johnston, 40.

INTERIOR DEPARTMENT.

Conclusiveness of Proceedings by. See PUBLIC LANDS, 5.

INTOXICATING LIQUORS.

ELECTIONS—REQUIREMENT OF NOTICE.

1. In the cases of special elections at uncertain times or on particular subjects, all statutory provisions as to notice are mandatory, as, for instance, in reference to local option elections under Laws 1905, p. 41, c. 2.

Marsden v. Harlocker, 90.

WHO MUST ORDER ELECTION.

2. Under the provisions of Laws 1905, pp. 41, 50, c. 2, providing for the filing of a petition for an election as to the sale of intoxicating liquors, providing a method of determining whether the petition is signed by the requisite number of voters, and that the county court shall order an election to be held if the petition is sufficient, it is imperative that the court determine the sufficiency of such petition, except the identity of the signatures, and order or refuse to order the election.

Marsden v. Harlocker, 90.

LOCAL OPTION—WHO CONSTITUTE COUNTY COURT—WHAT IS AN ORDER.

3. The "court" referred to in Laws 1905, p. 41, c. 2, § 1, conferring on a county court authority to order an election on the question of selling liquor in specified districts, is the body of persons designated by statute to sit in the capacity of a court, officially convened at a proper time and place; so, a memorandum signed at their homes separately by the members of the court is not an "order," not being made by the court.

Marsden v. Harlocker, 90.

SAME—CASE UNDER CONSIDERATION.

4. Where a county judge and a commissioner met at a time not fixed by statute or any order of court, a writing then signed by them purporting to call an election under the local option law is not an order of court and is void, as those persons did not then compose the county court.

State ex rel. v. Rhodes, 133.

NATURE OF DUTY OF COUNTY COURT IN DECLARING RESULT OF LOCAL OPTION ELECTION.

5. The duty required of the county court by the local option law as

to declaring the result of an election (Laws 1905, pp. 41, 47, c. 2, §10), and forbidding the sale of liquors as a beverage within the prescribed limits, is ministerial rather than judicial.

State ex rel. v. Richardson, 309.

CONSTITUTIONAL RIGHT TO SELL LIQUORS.

6. The privilege of selling intoxicating liquors as a beverage is not a common right of American citizenship protected by the Fourteenth Amendment to the Constitution of the United States.

State ex rel. v. Richardson, 309.

JETTY.

Right to Protect Banks by Constructing—Liability for Resulting Injury to Other Riparian Owners. See *WATERS*, 6, 9.

JOINT LIABILITY.

Law of Responsibility for Joint Carelessness. See *NEGLIGENCE*, 4.

JOINT TORT FEASORS.

Liability for Joint Wrongs Producing Injury. See *NEGLIGENCE*, 4.

JUDGMENT.

EFFECT OF DECREE IN COLLUSIVE SUIT.

1. A collusive proceeding is not binding on parties or privies, and questions there decided may be re-examined upon proof of the prior collusion.

Multnomah County v. White, 183.

RES JUDICATA—PARTIES CONCLUDED.

2. A judgment or decree, to be available as an estoppel barring a subsequent proceeding, must have been between the same parties or others in privity with them.

Parkersville Drainage District v. Wattier, 332.

EFFECT OF DOCKETING JUDGMENT—ATTACHMENT LIEN.

3. The effect of properly entering a judgment in a legal docket is to create thereby a lien on the unattached real property of the judgment debtor. Where, however, the judgment is merely entered in the court record without being docketed, the attachment lien remains unaffected.

Katz v. Obenchain, 352.

JUDGMENT AGAINST NONRESIDENT—NATURE AND LIFE OF.

4. A judgment against a nonresident based on a service of summons by publication is valid as a judgment against the attached property only, which will continue to be enforceable so long as an execution may issue.

Katz v. Obenchain, 352.

WAIVER OF JUDGMENT LIEN BY NONENFORCEMENT.

5. In the absence of a showing of authority or intent a direction of an attorney to an officer not to sell under an execution writ certain real property on which his client had a lien cannot be considered a waiver of the lien.

Katz v. Obenchain, 352.

VALIDITY OF UNDOCKETED JUDGMENT—EXECUTION.

6. The validity of a judgment is not at all dependent upon its being docketed, nor is an execution regularly issued on a judgment affected by a failure to properly docket.

Katz v. Obenchain, 352.

JUDICIAL NOTICE.

Information of Case Acquired on Former Hearing. See *EVIDENCE*, 1.

Local Custom as to Appropriation of Water. See *EVIDENCE*, 2.

Operation of Laws of Nature—Hydraulics. See *EVIDENCE*, 3.

JURISDICTION.

Effect of Appearance—Subject Matter. See COURTS, 1.

JURY.

RIGHT OF JUDGE TO DISCHARGE ACCEPTED JUROR FOR CAUSE.

1. A trial judge is in duty bound to see that an impartial jury is selected, and to that end he may excuse persons who have been accepted by both sides, if in his judgment they ought not to serve, and for reasons not named in the statute, the discretion thus exercised being subject to review. *State v. White*, 416.

DISCHARGING JURORS BY COURT—PEREMPTORY CHALLENGES.

2. The right of peremptory challenge is one of rejection and not of selection, and the fact that a judge sua sponte, over objection and after a party has exhausted his peremptory rights, excuses a juror who has been accepted by both parties, does not constitute error, since the party aggrieved is not thereby deprived of a challenge, and he has no right to insist that any particular juror shall serve. *State v. White*, 416.

RIGHT OF JUDGE TO ACT AS JURY.

3. A trial judge has no authority to try a law action alone, unless a jury is waived in the manner provided by statute.

Puffer v. American Insurance Co. 475.

JUSTICES OF THE PEACE.

APPEAL—AUTHENTICATING TRANSCRIPT.

The transcript required by Section 2246, B. & C. Comp., to perfect an appeal from a justice's court to a circuit court, must be authenticated by the justice before whom the case was tried, or by some one whom he has authorized to affix his signature. Unless so authenticated the transcript is void and the appeal cannot be sustained. *Shaw v. Hemphill*, 371.

KIDNAPPING.

INDICTMENT—CONJUNCTIVE CHARGE NOT DUPLICITOUS.

1. Under the rule established in this state that an information may conjunctively charge acts disjunctively enumerated in a statute, an information charging that defendant forcibly seized, confined, inveigled and kidnapped another is sufficient under Section 1774, B. & C. Comp., subjecting to punishment every person who without lawful authority forcibly seizes and confines another, or inveigles or kidnaps another, with intent to send him out of the state against his will. All the acts charged may be committed in a single kidnapping, since no one is repugnant to any of the others. *State v. White*, 416.

EVIDENCE OF ASSOCIATED CRIME.

2. In a prosecution for kidnapping, where the jury are instructed at defendant's request that he is not charged with enticing seamen and that he cannot be found guilty of such offense, he is not prejudiced by evidence tending to prove that crime as part of the kidnapping.

State v. White, 416.

KNOWN DANGER.

Effect of Knowledge of Risk by Workman. See MAST. & SERV. 4.

LABOR.

Females—Regulation Under Police Power. See CONST. LAW, 16.

Children—Regulation by Legislature. See CONST. LAW, 17.

LACHES.

Conduct Not Showing Unreasonable Delay. See SPEC. PERF. 6.

LAND BOARD.

Conclusiveness of Deeds of on Collateral Attack. See PUBLIC LANDS, 5.
Quantity That May be Conveyed by One Deed. See PUBLIC LANDS, 10.

LANDLORD AND TENANT.**LEASE—SUFFICIENCY OF CONSIDERATION.**

1. A promise not to claim further rent under the terms of a lease is a sufficient consideration for a release of all rights under it, and a promise to pay rent is an adequate consideration for the execution of a lease.

Livesley v. Heise, 147.

ESTOPPEL ON TENANT—EXECUTION SALE AGAINST LANDLORD.

2. A tenant is not estopped by his relation to the landlord from purchasing the demised land at an execution sale against the landlord.

Nodine v. Richmond, 527.

LAW OF THE CASE. See APPEAL & ERROR, 4.

LAWS OF NATURE. Judicial Notice of by Courts. See EVIDENCE, 3.

LAWS OF OREGON.

For Compiled Laws, see STATUTES OF OREGON.

For Uncompiled Laws, see SESSION LAWS OF OREGON.

LEASE.

Promise Not to Claim Rent—Release. See LAND. & TEN. 1.

Promise to Pay Rent—Consideration. See LAND. & TEN. 1.

LETTERS as Evidence. See EVIDENCE, 6.

LICENSE.

Nature of Permission to Conduct Business That May Affect Public Health. See CONTRACTS, 1.

LIEN.

Attorney's Lien Not Enforceable Till Judgment. ATTY. & CLIENT, 3.

Duration of Attachment Lien After Judgment. See ATTACHMENT, 1.

LIMITATION OF ACTIONS.

NOTES—EFFECT OF PAYMENT BY TRUSTEE IN BANKRUPTCY OF ONE SIGNER ON LIABILITY OF OTHER SIGNERS.

Under Sections 24 and 25 of B. & C. Comp., providing that the statute of limitations as to an existing contract shall begin to run from the time the last payment was made, if the statute has not then run, a part payment on an existing obligation by the trustee in bankruptcy of one of the obligors extends the life of the obligation as to all the obligors.

Sheak v. Wilbur, 376.

See QUIETING TITLE.

LOAD CHECK.

Conclusiveness of on Warehouseman. See CONTRACTS, 5.

LOCAL OPTION.

Notice of Local Option Election is Necessary. See INTOX. LIQUORS, 1.

Duty of County Court in Ordering Election. See INTOX. LIQUORS, 2.

When Local Option Election Must be Ordered. See INTOX. LIQUORS, 2.

Memorandum Signed by Members of County Court Not in Session Not an Order for Election. See *INTOX. LIQUORS*, 3, 4.

Act of 1905 Does Not Confer Special Privileges. See *CONST. LAW*, 14.

Act of 1905 Does Not Affect Free Electoral Rights. *CONST. LAW*, 10.

Duty of Declaring Result of Election is Ministerial. *INTOX. LIQUORS*, 5.

Title of Local Option Act of 1905 Expresses Subject. See *STATUTES*, 2.

Act of 1905 Not Unconstitutional in Requiring County Courts to Declare Result of Election. See *CONST. LAW*, 1.

LOCATING COUNTY ROAD. See *HIGHWAYS*, 1-3.

LOCATION.

Purpose of Statutes Requiring Location Notice. See *MINES*, 3.

Who May Question Sufficiency of Location. See *MINES*, 4.

Validating Void Location by Discovering Vein. See *MINES*, 6.

MANDAMUS.

POWER TO ALLOW AMENDMENT—DISCRETION.

1. Under the provision of Section 612, B. & C. Comp., concerning the amendment of pleadings in mandamus proceedings, the trial court has a wide discretion, and its action in granting or refusing an amendment while the cause is in the trial court will not ordinarily be disturbed.

State ex rel. v. Richardson, 309.

APPEAL—AMENDING AFTER REVERSAL.

2. Where a judgment sustaining a demurrer to an alternative writ of mandamus and dismissing the proceeding is affirmed on appeal and the cause remanded with a direction to enter a judgment accordingly, the power of the trial court to permit amendments still remains.

State ex rel. v. Richardson, 309.

COUNTY COURT—DECLARING RESULT OF LOCAL OPTION ELECTION.

3. Mandamus will lie to compel a county court to declare the result of a vote under the local option act as required by Section 10, as the act required does not involve the exercise of either discretion or judgment, being entirely ministerial.

State ex rel. v. Richardson, 309.

MASTER AND SERVANT.

RELATION NOT JOINT SO AS TO SUPPORT AN ESTOPPEL.

1. The relation of master and servant does not constitute such a joint participation in a joint enterprise as to support an estoppel.

Brown v. Gold Coin Mining Co. 277.

DUTY TO FURNISH APPLIANCES.

2. Though a master is under an obligation to use due care in providing suitable and safe materials and appliances, he is not bound to provide the most improved appliances, and his duty is discharged when he has furnished appliances that are reasonably safe and suitable when properly used.

Blust v. Pacific Telephone Co. 34.

DUTY TO MAKE RULES—HANGING TELEPHONE CABLES.

3. Under some conditions it becomes the duty of the master to make and enforce suitable rules for the government of his employees in doing certain work, but not when the work is simple and the use of the appliances obvious, as, in putting up telephone cables by wire ropes and hooks.

Blust v. Pacific Telephone Co. 34.

ASSUMPTION OF KNOWN RISK.

4. An experienced lineman, familiar with the methods and appliances usually used in stringing wires and cables on poles, and particularly with

the method used by a particular employer, who returns to work and continues with that employer without objection to the method in use, assumes the risk of that manner of doing the work.

Blust v. Pacific Telephone Co. 34.

EVIDENCE OF ASSUMPTION OF RISK.

5. In an action for damages for wrongfully causing the death of one who was drowned by the capsizing of a barge on which he was at work under the direction and supervision of the owner, deceased being wholly inexperienced in water craft work, and not having been at all warned of the risk from the dangerous condition of the barge, the fact that stevedores working on the same barge were apprehensive of a disaster, and mentioned it in his hearing, is not sufficient to charge deceased with having assumed the risk of the employment, for it does not show that he knew the danger or the actual condition of the barge.

Strauhal v. Asiatic Steamship Co. 100.

LIABILITY OF MASTER FOR MEDICAL ATTENDANCE TO SERVANT—EFFECT OF PAYING HOSPITAL DUES—CHARITIES.

6. The collection by a master from his servants of a stated amount each month for maintaining a hospital for his employees, in the absence of a contract with such servants to furnish them attendance at the hospital, amounts to only a subscription by the employees for the support of a place where they can obtain such attendance as the amount subscribed will provide, and the master is not bound to supply all the medical or surgical services that may be needed by injured contributors, though he is bound to spend the subscription for the purpose indicated and to use ordinary care in selecting the persons to have charge of the hospital.

Miller v. Beaver Hill Coal Co. 136.

PERSONAL INJURY—CONSTRUCTION OF COMPLAINT—NEGLIGENCE IN NOT PROMULGATING RULES AND REGULATIONS.

7. In an action for injuries to an employee sustained in running logs down a shoot for defendants, a complaint alleging that without the enforcement of regulations governing the manner in which the work was to be done the place at which plaintiff was working was extremely dangerous, and that defendant neglected to promulgate or enforce any rule or regulation for the safety of its employees, the want of which was the cause of the accident, and that defendant had an employee at the head of the shoot to start the logs and warn the employees below, but that shortly before the accident such employee had been removed and others directed to send the logs down without any system, after which plaintiff was injured, is sufficient as charging negligence in not providing suitable regulations governing the conduct of the work.

Lindsay v. Grande Ronde Lumber Co. 430.

MEASURE OF DAMAGES.

When Awarded in Lieu of Decree of Specific Performance of Contract to Sell. See DAMAGES, 5.

For Breach of Contract to Sell—Interest. See DAMAGES, 1.

For Breach of Contract to Convey Land—Liens. See VEND. & PUR. 11.

For Conversion of Chattels. See DAMAGES, 4.

Delivering Goods Inferior to Those Ordered. See DAMAGES, 3.

For Refusing to Sell at Contract Price. See DAMAGES, 1, 2.

MECHANIC'S LIEN.

SUFFICIENCY OF NOTICE.

1. Under Section 5644, B. & C. Comp., a notice of mechanic's lien

must show on its face that the claimant either furnished material or performed labor which was used in the building under construction.

Barton v. Rose, 235.

SAME—CASE UNDER CONSIDERATION.

2. A claim reciting that "T. has by virtue of a contract with R. in the erection, material furnished and labor of a certain dwelling house," etc., is ineffectual for any purpose because there is no verb showing that anything was done.

Barton v. Rose, 235.

MEDICAL EXPERTS.

Example of Witness Held to be Qualified. See EVIDENCE, 14.

MERGER.

Rule in Equity to Preserve Conflicting Interests. See EQUITY, 5.

Absorption of Mortgage by Subsequent Deed. See MORTGAGES, 1.

MIGRATORY STOCK.

Sheep Grazing Act of 1905 Not a License Act. See TAXATION, 2.

MINES AND MINERALS.

INJUNCTION AGAINST POLLUTION BY MINING DEBRIS.

1. Where, by reason of the insufficiency of defendant's dam, the dumping of tailings from defendant's quartzmill into the stream by which plaintiff's farm was irrigated during the irrigation season will practically destroy the farm, plaintiff is entitled to enjoin defendant either from operating its mill during the irrigation season or from permitting the tailings during that period to flow down the channel of the stream.

Brown v. Gold Coin Mining Co. 277.

CONCLUSIVENESS OF PATENT.

2. A patent from the United States for a mining claim is conclusive as to all facts necessary to establish the validity of the patent against adverse claimants.

Sharkey v. Candiani, 112.

EFFECT OF STATUTE REQUIRING NOTICE OF LOCATION.

3. Statutes providing for notices of mining locations, such as Section 3978, B. & C. Comp., are intended only as a means of determining the rights of conflicting claimants, and therefore it will be a compliance with such laws to make proper markings on the ground at any time before adverse rights attach.

Sharkey v. Candiani, 112.

WHO MAY QUESTION SUFFICIENCY OF LOCATION.

4. Only adverse claimants under a subsequent notice or notices can question the sufficiency of a location of a mining claim.

Sharkey v. Candiani, 112.

INITIATION OF VALID MINING CLAIM.

5. Under Section 2320, Rev. Stat. U. S., and Section 3975, B. & C. Comp., a valid right to a mining claim is initiated by the discovery by a qualified person of a vein of mineral-bearing rock in place on vacant land of the United States, and the appropriation thereof by such person by performing the acts prescribed in those statutes.

Sharkey v. Candiani, 112.

VALIDATION OF LOCATION BY SUBSEQUENT DISCOVERY OF VEIN.

6. A claim to mining ground void because no mineral vein was discovered thereon prior to the posting of notices of location, will be validated by a subsequent discovery of such a vein in place within such claim, if no adverse rights have accrued in the meantime.

Sharkey v. Candiani, 112.

RIGHT TO FILE ON PATENTED GROUND.

7. No location can be made on land already patented unless it has been abandoned so that it has again become part of the unappropriated public domain. *Sharkey v. Candiant*, 112.

EXTENT OF RIGHT OF COTENANT TO ABANDON CLAIM.

8. Though ordinarily a cotenant cannot, without special authority from his cotenants, abandon any greater interest in property than he personally owns, yet, in the present case, the position and general supervisory power of the resident managing partner, and the kind of property involved, induce the holding that such manager had power to bind all the owners by his negligence in permitting a subsequent locator to trespass upon and improve part of their claim for so long a time.

Sharkey v. Candiant, 112.

WHAT CONSTITUTES ABANDONMENT.

9. No overt act is necessary to constitute an abandonment, it results from an exercise of the will. *Sharkey v. Candiant*, 112.

EFFECT OF ABANDONMENT ON TITLE TO REALTY.

10. An abandonment of a claim to real property does not have the effect of transferring the title to any one. *Sharkey v. Candiant*, 112.

NEED OF PROMPTNESS IN CLAIMING MINING GROUND.

11. The possible fluctuations in the value of mining claims resulting from discoveries on other claims render it important that claimants should promptly and continuously assert any rights they may think they have in locations, and a failure to resent with reasonable promptness a trespass on a located claim will be considered an abandonment of the ground actually occupied by the trespasser. *Sharkey v. Candiant*, 112.

MONEY RECEIVED.**BREACH OF CONTRACT—NEED OF PLEADING OFFER TO PERFORM.**

1. In an action to recover money paid on a contract that has been repudiated, as money received to the use of plaintiff, no offer of performance or declaration of readiness to perform is necessary.

Hanley v. Combs, 409.

ATTACHMENT—IMPLIED CONTRACT.

2. An action to recover money paid on a contract that the other party afterward repudiated is in form an action of assumpsit and the legal liability to repay is an implied contract for the direct payment of money, under B. & C. Comp. § 296, subd. 1.

Hanley v. Combs, 409.

TRUSTEE—EQUITABLE CONTROL—MONEY HAD AND RECEIVED.

3. One holding the legal title to land under a promise to sell and make a given disposition of the proceeds is subject to two alternatives; he can be compelled to sell if he refuses to do so upon the offering of a reasonable price, or, if he sells, the parties entitled to the proceeds may sue for their proportions as for money had to their use.

Hamilton v. Holmes, 453.

MORTGAGES.**MERGER OF MORTGAGE INTO DEED.**

1. Where a mortgagee acquires by deed the legal title to the mortgaged property after a subsequent lien has attached thereto, but without knowledge of that fact, equity will keep the estates separate for the protection of the mortgagee.

Katz v. Obenchain, 352.

EFFECT OF DEED OF MORTGAGED LAND BY MORTGAGEE.

2. Where, as in Oregon, a mortgage on real estate creates only a lien thereon, a deed of the encumbered property by the mortgagee to a stranger does not operate as an assignment of the mortgage as against third persons, unless such deed shows that such an effect was intended.

Noble v. Watkins, 518.

MOTION.

Certiorari—Motion to Quash Not Proper. See WRIT OF REVIEW, 2.

Striking Out Evidence—Time of Objecting. See APPEAL.

To Dismiss Appeal. See APPEAL, 21.

Purpose of Motion to Make More Certain. See PLEADING, 15.

Motion to Strike is Not an Answer. See PLEADING, 6.

MUNICIPAL CHARTERS. Same as CHARTERS OF CITIES.

MUNICIPAL CORPORATIONS.

RIGHT TO DELEGATE POLICE POWER TO MUNICIPALITIES.

1. The police power of a state, or a portion of it, may be delegated to a municipal corporation within the state, which then becomes an agent of such state with authority to use the power so delegated.

Portland v. Cook, 550.

CONSTRUCTION OF ORDINANCE.

2. After the repeal of an ordinance granting a person and his assigns the right to maintain a packing-house within the limits of a city, the city council passed an ordinance making it unlawful for any person to slaughter within the city limits any animal, the flesh of which was intended to be offered for sale. After this the city, under a statute granting it the power to regulate, restrain and exclude from the city slaughter-houses, passed another ordinance authorizing the operation of defendants' slaughterhouse within the city limits without any clause restricting violations of the previous ordinance or with reference to penalties incurred thereunder. Held, that the latter ordinance was only operative prospectively, and did not repeal the prohibitory ordinance in respect to violations thereof committed prior to the passage of the later ordinance.

Portland v. Cook, 550.

RIGHT TO RESELL LOTS ONCE SOLD UNDER VOID PROCEEDING.

2. Section 400 of the Portland Charter of 1903, which authorizes the city to reassess property for public improvements in certain specified instances, does not authorize the city to sell under such reassessment where a sale was made under the prior assessment, even though such sale was entirely void, in the absence of a provision in the charter for returning the purchase price paid at the first sale.

Gaston v. Portland, 82.

SAME.

4. That part of Section 400 of the Portland Charter of 1903, providing that where a sale has been declared void and the property shall be resold under a reassessment for public improvements, the entire proceeds shall be paid to the purchaser at the prior sale, is unconstitutional, as providing for a seizure of one man's property to give to another, in violation of Const. Or. Art. I, § 18, which impliedly prohibits the taking of private property for private use at any price.

Gaston v. Portland, 82.

RIGHTS OF PURCHASERS OF LOTS SOLD FOR PUBLIC IMPROVEMENTS.

5. Contractors for public improvements who purchase property sold for unpaid assessments on their own work have no further rights than

other persons purchasing under similar circumstances, and buy at their peril. *Gaston v. Portland*, 82.

LOSS OF STREETS BY NONUSER.

6. Although title to land dedicated as a street cannot be acquired against a city through lapse of time under a statute of limitations, still rights to even a street may become so fixed by neglect to open and use it, that it may be more just to enforce an equitable estoppel against the municipality than to retake the street. *Oliver v. Snghorsr*, 292.

MUTUALITY.

Example of Contract Not Binding Both Ways. See CONTRACTS, 2.

NEGLIGENCE.

RES IPSA LOQUITUR.

1. The doctrine of *res ipsa loquitur* becomes applicable through the circumstances surrounding and accompanying the occurrence causing the injury complained of, rather than by the occurrence itself. Usually the description of the event includes circumstances from which negligence may fairly be inferred; yet there are cases (and this is one) where the occurrence does not justify any inference of negligence.

Goss v. Northern Pacific Railway Co. 439.

EVIDENCE REBUTTING PRESUMPTION.

2. Where the evidence of negligence is entirely inferential and the testimony for the defendant is clear and undisputed to the effect that there was no negligence, the plaintiff's case is overcome as a matter of law and it becomes the duty of the judge to take the case from the jury.

Goss v. Northern Pacific Railway Co. 439.

EVIDENCE CONSIDERED.

3. The evidence shows negligence by the Oregon Round Lumber Co. and the Portland & Asiatic Steamship Co., but not by the Oregon Railroad & Navigation Co. and a nonsuit was properly granted as to the latter.

Strauhal v. Asiatic Steamship Co. 100.

JOINT LIABILITY FOR CONCURRENT NEGLIGENCE.

4. This is an example of a proper application of the rule that where an injury results from the concurring negligence of two or more persons, though acting separately, either or all are liable; viz: a barge owner having let it in an unseaworthy condition, retaining supervision over it, and allowed it to become waterlogged, and having sent deceased to work at the pumps, knowing the situation to be dangerous, but without warning him, is jointly liable in damages for his death by the capsizing of the barge with the lessee who improperly loaded and used such barge.

Strauhal v. Asiatic Steamship Co. 100.

NEGOTIABLE INSTRUMENTS. Same as BILLS & NOTES.

NEWLY DISCOVERED EVIDENCE.

Remedy is Not by Dismissing Appeal, but by Original Suit to Impeach the Final Order. See APPEAL, 20.

Example of Newly Discovered Evidence. See APPEAL, 20.

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NOTICE.

General and Special Elections Differ as to Requirements of Notice Necessary to be Given. See ELECTIONS, 1.

Summary Cancellation of Bond for Deed. See **VEND. & PUR.** 7.
 Mines—Effect of Statutes Requiring Notice. See **MINES**, 3.
 Sufficiency of Claim of Lien. See **MECHANIC'S LIENS**, 1, 2.

ACTUAL NOTICE OF LIEN.

The statement by one of the payees of a note to the cashier of a bank at which he left it for collection, that he had a mortgage on the maker's sheep to secure the note constitutes actual notice to such bank of the mortgage so referred to, though it also secured the payment of another note that was not referred to. *Williams v. First National Bank*, 571.

NUISANCE.

INTERFERENCE WITH MINING DEBRIS BY DAM.

1. A dam that interferes with the flowage of mining debris of a superior riparian proprietor is a nuisance that he may enjoin. *Kane v. Littlefield*, 299.

NUISANCE—SLAUGHTERHOUSE.

2. The occupation of a building in a city as a slaughterhouse is *prima facie* a nuisance to persons residing near it. *Portland v. Cook*, 550.

LIMIT OF POWER TO DECLARE NUISANCES.

3. Public authorities cannot arbitrarily declare that to be a nuisance which is not really so, although their action is very persuasive. *Portland v. Cook*, 550.

Railroad Track in Street—Use by Public. See **RAILROADS**, 6, 7.

OBJECTIONS NOT MADE IN TRIAL COURT.

Availability of Such Points on Appeal. See **APPEAL**, 12, 16.

OFFICERS.

OFFICIAL BONDS—TEST OF VALIDITY.

1. The validity of an official bond is determined by the signatures thereto, and not by the insertion of the names of the parties in the body of the instrument. *Baker County v. Huntington*, 593.

OFFICIAL BONDS—LIMITING LIABILITY OF SURETIES.

2. The liability of the sureties on a joint and several official bond is not affected as to the obligee by any memoranda opposite the signatures, as, "For \$1,000," the responsibility being fixed by the terms of the promise. *Baker County v. Huntington*, 593.

TRIAL—INSTRUCTION NOT ASSUMING FACTS.

3. In an action on an official bond, an instruction that the mere signing by the sureties of an uncompleted instrument and leaving it with the principal without any express restrictions as to its delivery, is not enough, as a matter of law, to show authority to deliver it, but it is an important fact, "if you find it to be a fact," to be considered, etc., does not assume that it had been proven that the defendants left the bond with the principal without restriction as to delivery. *Baker County v. Huntington*, 593.

ASKING PARTICULAR INSTRUCTIONS.

4. That instructions as to certain restrictions and reservations claimed to have been made in connection with the delivery of a bond in suit were confined to the time of delivery is not a subject for complaint by the defendants, where they did not request that prior conversations be included in that portion of the charge. *Baker County v. Huntington*, 593.

OFFICIAL BONDS.

Signatures Are the Binding Feature of a Bond. See OFFICERS, 1.
Limiting Liability by Notation Opposite Signature. See OFFICERS, 2.

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Where Facts Can be Intelligibly Stated by Witness Without Mingling
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OREGON CONSTITUTION. Same as CONSTITUTION OF OREGON.

OREGON STATUTES. Same as STATUTES OF OREGON.

OTHER OFFENSES.

Need of Charging Purpose for Which Evidence of Other Offenses May be Considered. See CRIMINAL LAW, 7.

PARENT AND CHILD.

EMANCIPATION—RIGHT TO EARNINGS.

The earnings of a minor child who has been allowed by his parents to act in business matters independent of their control are not liable to the claims of creditors of the parents. *Livesley v. Heise*, 147.

PAROL EVIDENCE.

Completed Written Agreement Cannot be Varied. See EVIDENCE, 11.
 Incomplete Written Agreement May be Explained. See EVIDENCE, 12.
 Ambiguous Memoranda May be Explained. See EVIDENCE, 12, 13.

PARTIES.

NEXT FRIEND AS PARTY—DEFECT OF WANT OF CAPACITY TO SUE—DEMURRER—WAIVER OF OBJECTION.

The next friend of an incompetent litigant is a "party" to the litigation.

tion, and if the incompetent has no capacity to sue, for any reason, the objection must be taken by demurrer, under Section 68, B. & C. Comp., or it will be considered waived, under Section 72. *Owings v. Turner*, 462.

PART PERFORMANCE.

Purchase by Cotenant From Another—Need of Changing Possession to Avoid Effect of Statute. See STATUTE OF FRAUDS, 1, 2.

Collateral Act in Reliance on Contract. See STATUTE OF FRAUDS, 4, 5.

Difference Between Taking and Continuing Possession in Connection With Specific Performance. See STATUTE OF FRAUDS, 5.

PATENT.

Conclusive Effect of Patent to Mine. See MINES, 2.

Ground Already Patented Not Locatable. See MINES, 7.

Conclusive Effect of Patent to Public Land. See PUBLIC LANDS, 5.

Neither Delivery Nor Acceptance Necessary. See PUBLIC LANDS, 6.

PAYMENT.

APPLICATION OF PAYMENTS.

1. Plaintiffs and defendant became indemnitors to the surety of a contractor on his agreement to purchase supplies from them, and on his inability to complete his contract plaintiffs and defendant, in order to reduce their liability, completed the work. Plaintiffs alleged that in carrying out the work they, at defendant's request, furnished merchandise and advanced money and rendered services to the amount of \$7,322.76 above all moneys received by them on account of the contract, including the account against the contractor due plaintiffs at the time of his failure, after allowing a credit on his account for \$4,000 paid to plaintiffs by the firm composed of plaintiffs and defendant after they commenced to complete the contract. *Held* that, in the absence of any allegation that any of the supplies were furnished or moneys advanced or services rendered to the contractor at defendant's request, the \$4,000 was applicable only to the indebtedness of the firm of plaintiffs and defendant to plaintiffs, and not to the indebtedness of the contractor. *Sexton v. McInnis*, 342.

PAYMENT—EVIDENCE—COMPETENCY.

2. On an issue as to whether defendant, who was the cashier of a bank, had by various payments repaid to plaintiff a sum of money belonging to plaintiff which had been appropriated by defendant, defendant produced a draft issued by his bank payable to plaintiff, and paid to him, and testified that he purchased it, and sent it to plaintiff at his request, and that it was not charged on the bank books to plaintiff. *Held*, that the draft and testimony were competent as tending to show a payment.

Boothe v. Scriber, 561.

SAME—CASE UNDER CONSIDERATION.

3. Defendant produced a draft drawn by plaintiff on defendant's bank payable to another bank and paid, and testified that he paid it out of his own funds. Plaintiff had an open account in the bank. *Held*, that the evidence was incompetent, as the records of the bank were proper evidence as to who paid the draft, and presumably the draft was paid from plaintiff's funds or charged to his account.

Boothe v. Scriber, 561.

SAME—CASE UNDER CONSIDERATION.

4. Notes given by plaintiff to defendant's bank and marked "paid" by the bank, and as to which defendant testified that they were paid by him at plaintiff's request, were competent evidence. *Boothe v. Scriber*, 561.

SAME—CASE UNDER CONSIDERATION.

5. Defendant produced three notes made by plaintiff to defendant's bank, having attached thereto a check of defendant payable to plaintiff or bearer for a sum in excess of the notes, and testified to a settlement with plaintiff, and that at plaintiff's request he paid the notes, by giving the check attached, and that the difference between the amount due on them and the check was paid to plaintiff in cash, and the check charged to his account on the bank books. *Held*, that the notes and check were properly admitted. *Boothe v. Scriber*, 561.

SAME—CASE UNDER CONSIDERATION.

6. Defendant testified that at various times he deposited sums to the credit of plaintiff, and offered in evidence deposit slips made out in his handwriting, and though he testified that he took the slips from the bank files, it was not shown that any of them were ever delivered to the bank or that it became liable for such deposits. *Held*, that the slips were incompetent evidence. *Boothe v. Scriber*, 561.

SAME—INSTRUCTIONS.

7. An instruction that as to the items claimed as a defense by defendant, "if a defense here they cannot be claimed as a defense by the bank in its action," was erroneous as misleading, the bank not being a party to the action. *Boothe v. Scriber*, 561.

PERJURY.

SUBORNATION OF PERJURY—SUFFICIENCY OF INDICTMENT AS TO MANNER OF COMMITTING THE CRIME.

1. An indictment for subornation of perjury is sufficient as to the manner of being sworn when it appears therein that the witness was "in due manner sworn," since that is equivalent to a charge that such witness was "duly sworn." *State v. Jewett*, 577.

SAME—CHARGE AS TO WHERE THE FALSE STATEMENT WAS PRESENTED.

2. An indictment charging the subornation of perjury by procuring a false oath to be made and setting out the entire paper, which is addressed to a certain public board, need not specifically charge that the oath was presented to any one, since the facts in that particular are apparent from the paper itself. *State v. Jewett*, 577.

SAME—IDENTITY OF PERSON.

3. Where an indictment for subornation of perjury alleged to have been committed with reference to an application for the purchase of school lands charges that the applicant made her application to purchase the land described for her own benefit, and not for the purpose of speculation, that she had made no contract or agreement, express or implied, for the sale or disposal of the lands, and that the application, oath and jurat were of the following tenor, which are then set out in full, such allegations sufficiently show that the affidavit had reference to the application, that the person who signed the affidavit is the same person who signed the application, and that the lands described in the application are identical with those referred to in the affidavit. *State v. Jewett*, 577.

SAME—CHARGING POWER TO RECEIVE AN OATH.

4. The State Land Board of this state being a board provided for by the constitution, it is not necessary that an indictment for suborning perjury before such board shall show that the board was duly constituted or had authority to consider the paper in which it is claimed the perjury was committed. *State v. Jewett*, 577.

SAME—CHARGING THE PURPOSE OF THE FALSE OATH.

5. An indictment for subornation of perjury in connection with an application to purchase school lands alleged that when the applicant was sworn she did not intend to purchase the lands for her own benefit as she affirmed, but for the purpose of speculation, and had prior thereto contracted to sell the land to defendant, which contract was then in full force, and that defendant knowingly and willfully incited her to testify falsely "in the manner aforesaid for the purposes herein specified." The indictment also charged that defendant procured her to take her oath to the effect that she then and there made application to purchase the lands, and that it was necessary for her to make such oath in order to procure such school lands from the state, and that she acquired the lands from the state by means thereof for the purposes specified. *Held*, that such allegations were sufficient to show the purpose for which defendant procured the applicant to make, and for which she made the false oath and affidavit, and for which such affidavit was used. *State v. Jewett*, 577.

SAME—CHARGING DETAILS OF FALSITY.

6. Where an indictment for subornation of perjury in connection with an application to purchase school lands alleges that at the time the applicant made the affidavit she did not intend to purchase the lands for her own benefit, but for speculation, and then had a contract to sell the lands to defendant, and that she well knew that her application was made for the purposes specified, the indictment is not objectionable in not alleging that the applicant had made a contract for the sale or disposal of the lands in case she was permitted to purchase, since the existence of the contract may be inferred from what is stated. *State v. Jewett*, 577.

SAME—TERMS OF CONTRACT.

7. Under B. & C. Comp., § 1321, declaring that an indictment for subornation of perjury need not set forth the pleadings, record, or proceedings with which the oath is connected, an indictment for subornation of perjury alleged to have been committed in connection with an application to purchase school lands in which it was charged the applicant falsely stated under oath that she had no contract to sell or dispose of the lands, was not objectionable for failure to set out the terms of the alleged contract or the facts showing such contract. *State v. Jewett*, 577.

SAME—KNOWLEDGE OF FALSITY.

8. Where an indictment for subornation of perjury in connection with an application to purchase certain school lands alleged that the applicant falsely, knowingly, and willingly swore that the proposed purchase was for her own benefit and not for speculation, and that she had made no contract for the sale of the lands, but that she at that time did not intend to purchase for her own benefit, and had a contract to sell to defendant, and knew that her application was made for such purpose, and that defendant knowingly procured her to testify falsely, and knew that she did not believe her testimony to be true, the indictment sufficiently alleged knowledge on the part of both parties. *State v. Jewett*, 577.

PLEADING.**MISJOINDER OF CAUSES.**

1. A complaint in which it is alleged that defendant operated a flouring mill having connected therewith a storage house for wheat; that it was the custom of defendant to receive wheat from farmers, to issue receipts therefor, to mix wheat received, and to sell the same or to grind it into flour at its own pleasure; that in delivering wheat and in issuing the

receipt the parties contracted with reference to such custom; that plaintiff accordingly delivered to defendant a certain amount of wheat; that defendant sold and disposed of the same and applied the proceeds to its own use; that plaintiff demanded the wheat or the payment of the value thereof, and that defendant refused to give either—contains but a single cause of action for breach of contract, and is not subject to the objection that a cause of action for breach of contract has been joined with a cause of action for conversion. *Savage v. Salem Mills Co.* 1.

SUFFICIENCY AGAINST GENERAL DEMURRER.

2. A pleading is good as against a general demurrer if it states at all or in any place a good cause of action or defense, and other matter may be eliminated for the purpose of the demurrer. *Jackson v. Stearns*, 25.

CONSTRUCTION OF ALLEGATIONS.

3. In pleadings the allegations should be direct and certain, as they will be construed generally against the pleader.

Oregon v. Warner Stock Co. 373.

SAME—CASE UNDER CONSIDERATION.

4. A charge that certain persons applied to purchase certain lands from the state as swamp lands, "having full notice and well knowing that none of the lands claimed was then or on the 12th day of March, 1860, swamp or overflowed land, but was then and on said 12th day of March, 1860, part of the bed of W. Lake and covered by the waters thereof," is a charge of belief on the part of the applicants, but not a charge as to the character and nature of the land itself.

Oregon v. Warner Stock Co. 378.

CURING DEFECTIVE COMPLAINT BY ANSWER—AIDER.

5. Where an essential fact has been omitted from the complaint, an issue as to such fact made by the answer and reply cures the defect in the complaint. For instance: In an action for damages for failing to deliver chattels as required by contract of sale, a failure to allege in the complaint that plaintiff was ready to accept and pay as required is remedied by a claim in the answer that the plaintiff was not present to receive the property at the time and place specified, which plaintiff denied in the reply. *Catlin v. Jones*, 158.

MOTION NOT AN ANSWER.

6. A motion to strike out parts of a complaint is not an "answer" within the meaning of Section 548, B. & C. Comp., providing for appeals, though a demurrer is an "answer," the difference being that the latter raises an issue of law while the former does not raise any issue.

Brownell v. Salem Flouring Mills Co. 525.

DENIAL OF "MATERIAL" ALLEGATIONS.

7. Under a statute authorizing general denials, such as Section 77, B. & C. Comp., as amended by Laws 1903, p. 205, it is doubtful whether a denial of the "material" allegations of a pleading is sufficient.

Kabat v. Moore, 191.

ANSWER—CONSTRUCTION OF ALLEGATIONS.

8. In an action for damages for breach of defendant's agreement to convey land to plaintiff, the complaint having alleged a demand and refusal, an answer not denying that allegation and admitting that plaintiff had demanded a conveyance, is an admission of a sufficient demand.

Jennings v. Oregon Land Co. 287.

ADMISSION BY FAILING TO DENY.

9. It is a general rule of pleading of varied application in this state, under B. & C. Comp. § 95, that affirmative allegations not denied are taken to be true. *Haines v. Connell*, 469.

REPLY—DUPLICATION OF DENIALS NOT NECESSARY.

10. Where the new matter of an answer amounts to merely a denial of the material allegations of the complaint, no reply is necessary.

Kabat v. Moore, 191.

AMENDMENT OF COMPLAINT—CANCELLATION OF INSTRUMENTS.

11. There is some question whether occurrences after the filing of a pleading should be presented by an amendment or by a supplemental pleading, but matters germane to the purpose of the first plea may be presented by amendment.

Jennings v. Jennings, 69.

SAME—CASE UNDER CONSIDERATION.

12. A bill by a husband against his wife to set aside a deed to her averred that, prior to the execution of the deed, their relations were strained, without setting out the particulars thereof or the reasons therefor. It alleged that the deed was executed pursuant to defendant's promise that in such event she would resume marital relations with plaintiff, which she had no intention of doing, and which she absolutely refused to do as soon as the deed was made. Before answer plaintiff filed an amended bill in which he alleged defendant's relations with another and her unlawful association with him, and alleged an act of adultery committed after the filing of the original bill. Held, that the matters so alleged, being germane to the original cause of suit and admissible under the original bill, were properly introduced by amendment.

Jennings v. Jennings, 69.

AMENDMENT—NEW CAUSE OF ACTION.

13. In an action for damages to the person alleged to have been caused by defendants jointly, an amendment alleging the employment of the person injured by one of the defendants alone, does not change the cause of action, it appearing from other allegations that the additional defendant owed the duty of not increasing the hazard of the injured person while in the performance of his duty. *Strauhal v. Asiatic Steamship Co.* 100.

NEED OF SERVING AMENDED PLEADINGS.

14. Under Section 100, B. & C. Comp., providing that amended complaints must be served on adverse parties, a decree based on an amended complaint that was not served cannot be sustained.

Nodine v. Richmond, 527.

PROPRIETY OF MOTION TO MAKE MORE CERTAIN.

15. Motions to make more definite and certain are intended to require additional information as to material matters only, and should not be allowed as to other allegations that may have been included in the pleading.

Kabat v. Moore, 191.

CORRECTING ERROR IN OVERRULING MOTION TO STRIKE OUT.

16. If a motion to strike out part of a pleading be overruled, the same question can be raised by objecting to the evidence offered in support of the allegations moved against, and by asking the court to strike it out of the record or instruct the jury to disregard it.

Brownell v. Salem Flouring Mills Co. 525.

AIDED BY VERDICT.

17. A pleading not fatally defective will be aided by a verdict, so that it will be considered sufficient on appeal.

Madden v. Welch, 199.

SAME—CASE UNDER CONSIDERATION.

18. A complaint showing that between certain dates plaintiff furnished to defendant feed and care for his horses of a stated value, that payment had been demanded and refused, and that the sum stated was due, which is defective in that it does not show either a request by defendant or a promise to pay, is aided by a verdict for plaintiff, on an answer denying the allegations of the complaint, and will be sufficient on appeal.

Madden v. Welch, 199.

WAIVER BY PLEADING OVER AFTER DEMURRER.

19. Error in overruling a demurrer for want of jurisdiction over the subject-matter of the suit is not waived by answering over.

Goodnough Mercantile Co. v. Galloway, 239.

DEFECT OF WANT OF CAPACITY TO SUE—WAIVER OF OBJECTION.

20. If the incompetent has no capacity to sue, for any reason, the objection must be taken by demurrer, under Section 68, B. & C. Comp. or it will be considered waived, under section 72. *Owings v. Turner*, 462.

See, also, *TROVER*, 1-4.

POLICE POWER.

Regulating Hours of Labor by Females. See *CONST. LAW*, 3.

Prohibiting Running at Large of Stock. See *CONST. LAW*, 5.

Right to Control Hours of Labor by Children. See *CONST. LAW*, 4.

Delegation of by State to Municipalities. See *MUNIC. CORP.* 1.

Control Over Right to Labor and Employ Labor. See *CONST. LAW*, 2.

POLITICAL QUESTIONS.

Control Over Public Officers in Political Matters. See *EQUITY*, 2, 3.

POLITICAL RIGHTS.

Local Option Law of 1905 Does Not Infringe on Political Rights Guaranteed by Constitution. See *CONST. LAW*, 10.

Not Invaded by Statute Requiring Property Qualification for School Election. See *CONST. LAW*, 11.

POSTPONEMENT.

Discretion of Trial Court in Postponing Trial. See *CONTINUANCE*.

POWER OF ATTORNEY

May be Revoked Unless Coupled with an Interest. *PRIN. & AGENT*.

PREMATURE PAYMENT.

Effect of on Rights of Surety. See *PRINCIPAL & SURETY*, 2.

Waiver of Effect of Irregular Payment. See *PRINCIPAL & SURETY*, 3.

PRESUMPTION

That a Person Understands the Vocation He Follows. *EVIDENCE*, 4.

As to Date When Trustee in Bankruptcy Took Possession of Property of Bankrupt. See *EVIDENCE*, 5.

As to Commission of Error by Trial Court. See *APPEAL*, 23-27.

As to Delivery of Deed in Possession of Grantee. See *DEEDS*, 1.

As to Prerequisites to Deeds of Public Lands. See *PUBLIC LANDS*, 5.

PRINCIPAL AND AGENT.

RIGHT TO REVOKE POWER OF ATTORNEY.

Though a power of attorney expressly states that the appointment is irrevocable and confers power of substitution, it is not an estoppel on the grantor to revoke it unless the assignee has a material interest under the appointment.

First National Bank v. Miller, 587.

PRINCIPAL AND SURETY.

FAILURE TO PURSUE PRINCIPAL DEBTOR.

1. Failure of a creditor to proceed against the principal debtor on the request of the surety does not release the surety from liability.

White v. Savage, 604.

PREMATURE PAYMENTS—DISCHARGE OF SURETY—WAIVER.

2. Where a security reserved in a building contract for the benefit of the sureties on the builder's bond is impaired by a premature payment to the contractor, the surety is discharged to the extent at least of the amount so paid unless the payment was made with the knowledge and consent of the surety.

Enterprise Hotel Co. v. Book, 58.

SAME—CASE UNDER CONSIDERATION.

3. But this defense may be waived, and a stipulation in the contract that payments made at times or in a manner other than as stipulated in the contract shall in no wise operate to release the sureties from liability, amounts to a waiver of that defense by both the principal and the sureties.

Enterprise Hotel Co. v. Book, 58.

ALTERING TERMS OF BUILDING CONTRACT—EFFECT ON SURETIES.

4. A contract for the construction of a building having provided that if the owner should, during the progress of the work, request in writing any alterations, the same should be made and should not make void the agreement, but the value thereof should be added to or deducted from the contract price, and the bond having provided that any departure from the specifications, or alterations of the same should not make void the bond, the act of the contractor in making changes without requiring the requests therefor to be in writing, does not release either the contractor or his sureties. The provision requiring the requests for changes to be in writing was for the protection of the contractor, and he could waive it if he desired, thereby waiving it for the sureties also.

Enterprise Hotel Co. v. Book, 58.

PRIVILEGES.

Special Rights Not Conferred by Local Option Law. CONST. LAW, 14.

Special Privileges Not Granted to Particular Persons by Act Regulating Hours of Labor by Women. See CONST. LAW, 18.

PROCESS.

NATURE OF JUDGMENT BASED ON PUBLICATION.

A judgment based on a publication of the summons can be executed on the attached property only, and cannot become a lien on unattached property. Of course, in a law action a publication can be made only after the levy of an attachment.

Katz v. Obenchain, 352.

PUBLIC IMPROVEMENTS.

Right to Sell Lots Twice for One Improvement. See MUNIC. CORP, 3, 4.

Purchases by Contractors for Their Own Work. See MUNIC. CORP. 5.

PUBLIC LANDS.

TIMBER CULTURE CLAIMS—EFFECT OF DEATH OF CLAIMANT.

1. The death of a timber culture entryman before making final proof entirely ends his rights to the land and any deed that may thereafter issue to his heirs for such land runs to them directly from the government and not through their ancestor. An administrator of the estate of such a claimant has no rights whatever as to the land so entered.

Warner Valley Stock Co. v. Morrow, 258; *Haun v. Martin*, 304.

CONTRACT BEFORE PATENT TO CONVEY HOMESTEAD.

2. A contract by a homestead claimant under the laws of the United States to convey to another such homestead, after obtaining title thereto, is void, as against the public policy of the national government, and cannot be enforced by either party.

Jackson v. Baker, 155.

SETTLERS ON PUBLIC LANDS—RIGHTS ACQUIRED.

3. Persons who settled on vacant unsurveyed public lands of the government, not swamp lands, nor selected as swamp lands, nor otherwise reserved, with intent to acquire title under the pre-emption, homestead or timber culture laws of the United States, and filed on the lands under the government laws, did not acquire any rights under the state swamp land laws.

Oregon v. Warner Stock Co. 378.

TITLE BY RELATION THROUGH PATENT.

4. The title of a patentee of swamp land from the State of Oregon relates to the date of the grant from the United States to the state, and carries the title as though it had been then executed.

Warner Valley Stock Co. v. Morrow, 258.

CONCLUSIVENESS OF PATENT ON COLLATERAL ATTACK.

5. Where the officers of the government, federal or state, have issued a patent in due form of law which on its face is sufficient to convey title to the land therein described, it will be conclusively presumed by courts of law that all prerequisites to the issuance of a valid patent were complied with, and therefore the title is not open to collateral attack in a law action.

Warner Valley Stock Co. v. Morrow, 258.

PATENT—NEED OF DELIVERY AND ACCEPTANCE.

6. A patent from the United States to a state for public lands is not open to the objection of incompetency without evidence that it was received by the state or some authorized agent, as the mere execution of a patent by the United States officers is sufficient to pass the title without delivery, the patent being a public record.

Warner Valley Stock Co. v. Morrow, 258.

RIGHT OF STATE TO SUE—INTEREST OF PLAINTIFF.

7. A state, as well as an individual, must show some interest in the subject of litigation to be entitled to recognition by the courts.

Oregon v. Warner Stock Co. 378.

SAME—CASE UNDER CONSIDERATION.

8. A state cannot maintain a suit to determine that persons claiming lands within its borders under the laws of the United States are entitled thereto against other persons claiming under the state laws, without showing some present interest in the land.

Oregon v. Warner Stock Co. 378.

SAME—COMPLAINT—SUFFICIENCY.

9. A complaint in a suit by a state, praying for a decree adjudging that persons who have settled on and claimed land under the pre-emption, homestead or timber culture laws are entitled thereto, in which it is alleged that the persons settled on vacant unsurveyed public lands, not swamp nor selected as swamp lands, nor otherwise reserved, with intent to acquire title under the pre-emption, homestead or timber culture laws, and that they filed on the lands under the federal laws, does not show any interest in the state in the lands essential to enable it to maintain the suit.

Oregon v. Warner Stock Co. 378.

RIGHT OF STATE TO DEED MORE THAN 320 ACRES TO ONE PERSON.

10. A deed from the State Land Board of Oregon for more than 320 acres of state land to one person is not void on its face for want of authority in the grantor to convey more than that quantity of such land, though the law limits to 320 acres the amount of any one purchase, for certificates of sale are transferrable, and one deed may be made for the total of many purchases that have been lawfully acquired by one person.

Warner Valley Stock Co. v. Morrow, 258.

PUBLIC POLICY.

Validity of Agreement by Client With His Attorney Not to Settle a Judicial Proceeding. See ATTORNEY & CLIENT, 4.

Contract to Convey by Homestead Claimant. See PUBLIC LANDS, 2.

QUASHING WRIT.

Certiorari—Answer is Only Pleading Permitted by Oregon Statute to be Made by Defendant. See WRIT OF REVIEW, 2.

QUIETING TITLE.

LIMITATION OF SUIT TO REMOVE CLOUD OR QUIET TITLE.

1. A suit to quiet title is not subject to any statute of limitations, for there is no date from which the period of limitation can be computed, as the adverse claiming is continuous. *Katz v. Obenchain*, 352.

SAME—CASE UNDER CONSIDERATION.

2. Where the holder of a mortgage acquires the title to and the possession of the premises without a foreclosure, after an attachment lien has accrued, a suit by him to enjoin a sale under the attachment is properly a suit to quiet his title, rather than to foreclose the mortgage, and is not affected by the statute limiting the right to sue on sealed instruments: B. & C. Comp. § 5, subd. 2. *Katz v. Obenchain*, 352.

RAILROADS.

LIABILITY FOR STOCK KILLED IN STATION GROUNDS—FENCES.

1. Section 5139, B. & C. Comp., making railroad companies liable for the value of stock killed by moving trains on or near its unfenced track, does not apply to station or yard grounds, within the limits of which fences are not required. *Wilmot v. Oregon Railroad Co.* 494.

SAME—QUESTION FOR COURT OR JURY.

2. Where it appears clearly that animals entered upon station grounds and were killed by moving cars, it is the duty of the judge to take the case from the jury as a question of law; but where, as in this case, the evidence is conflicting as to whether the point of entry is within the station grounds, the question should be submitted to the jury.

Wilmot v. Oregon Railroad Co. 494.

EXTENT OF STATION GROUNDS.

3. The depot or station grounds of a railroad company is the place where passengers get on or off the train, and where freight is loaded and unloaded, including all grounds reasonably necessary or convenient to that purpose, together with the necessary tracks, switches and turnouts thereon, or adjacent thereto, necessary for handling and making up trains, storage of cars, etc., and so much of the main track outside the switches as is necessary for the proper handling of trains at the station.

Wilmot v. Oregon Railroad Co. 494.

EFFECT OF DESIGNATING STATION GROUNDS.

4. Where grounds have been appropriated and set apart by a railroad

company for station or depot purposes, such appropriation affords strong evidence that the boundaries so fixed are such as and no more than are necessary and proper. *Wilmot v. Oregon Railroad Co.* 494.

KILLING STOCK—CONTRIBUTORY NEGLIGENCE IS QUESTION FOR JURY.

5. In an action against a railroad company for killing plaintiff's stock, the question whether plaintiff was guilty of contributory negligence in turning the stock out to graze on unenclosed lands near the depot, was for the jury. *Wilmot v. Oregon Railroad Co.* 494.

RIGHT TO MAINTAIN TRACK IN STREET WHEN CONSTRUCTED WITH CONSENT OF ABUTTING OWNERS—ESTOPPEL.

6. After a railroad track has been constructed with the consent of the abutting owners to its location, and has been maintained for many, say twenty, years, such owners cannot complain of its location, both because they are estopped by their consent and because the application for relief has not been seasonably made. *Wolfard v. Fisher*, 479.

TRACK IN STREET—RIGHT OF PUBLIC TO USE—NUISANCE.

7. Where a railway switch, though used largely by defendant, is open to all persons for shipping purposes, it is a public track, and its presence in a public street does not constitute a nuisance *per se*. *Wolfard v. Fisher*, 479.

RATIFICATION.

Conduct Showing Approval of Acts of Agent. See CORPORATIONS, 2.

RECORDS.

A patent from the United States is in and of itself a public record and passes title to the land therein described without delivery. *Warner Valley Stock Co. v. Morrow*, 258.

REFERENCE.

WAIVER OF JURISDICTION TO TAKE TESTIMONY IN ANOTHER COUNTY.

1. Where a referee has without special authority taken the testimony of witnesses in another county than the one in which he was appointed, and more than 20 miles from the place of holding court, any objection to such testimony for want of jurisdiction in the referee to take it is waived by cross-examination. *Sharkey v. Candiani*, 112.

REFERENCE—RIGHT OF JUDGE TO ACT AS REFEREE—WAIVING JURY.

2. A trial judge has no authority to act as a referee in a law action without the consent of the parties. *Puffer v. American Insurance Co.* 475.

RIGHT TO TRIAL BY REFEREE AFTER REFERENCE.

3. A trial judge cannot himself decide the case on the testimony taken by the referee, against the objection of a party, as the statute gives the right to a trial in law action either by a jury or a referee, and there are some material advantages under that right of which a party cannot be arbitrarily deprived. *Puffer v. American Insurance Co.* 475.

DELAYED REPORT OF REFEREE—REMEDY—RIGHT OF PARTIES TO TRIAL BY REFEREE AFTER REFERENCE.

4. Where a report of a referee in a law action is unreasonably delayed the judge may order the report filed and enforce obedience to his orders by appropriate means. *Puffer v. American Insurance Co.* 475.

Effect of Misdescribing Special Referee. See DEPOSITIONS.

RELATION.

Title of State to Land Grant Relates to Date of Patent From the Government. See PUBLIC LANDS, 4.

REMANDMENT.

Equity Right to Amend After Reversal. See **APPEAL**, 39-41.

Law—Right to Amend After Reversal. See **APPEAL**, 37-38.

REMOVING CLOUD From Title. Same as **QUIETING TITLE**.

REPEAL by Implication. See **STATUTES**, 3, 4.

REPLY.

Denial of New Matter Merely Denying Complaint. See **PLEADING**, 10.

REPUGNANCY in Acts Charged. See **INDICTMENT & INFORMATION**, 1.

RESCISSION.

Right of Seller to Refuse Performance. See **SALES**, 14, 15.

Right of Buyer to Refuse Performance. See **SALES**, 17.

Facts Should be Submitted to Jury. See **SALES**, 3.

RESIDENCE.

Effect of in Determining Place of Domicile. See **DOMICILE**, 3.

RES INTER ALIOS ACTA. See **EVIDENCE**, 7.

RES IPSA LOQUITUR. See **NEGLIGENCE**, 1.

RES JUDICATA. See **JUDGMENT**, 2.

REVISED STATUTES OF THE UNITED STATES Cited in This Volume.

See **STATUTES OF THE UNITED STATES**.

RIOT.**ELEMENTS OF THE CRIME OF RIOT.**

1. Under B. & C. Comp. §1913, which defines riot as the use of any force or violence, or any threat to use force or violence, by three or more persons acting together and without authority of law, if accompanied by immediate power of execution, it is not necessary that the three persons do the same act, but the offense is committed if the required number of individuals have a common purpose to do the act complained of or assist one another to that end, in the manner named, though the individual act of each was separate from that of the others. *State v. Miris*, 165.

RIOT—KIND OF PROOF OF COMMON PURPOSE.

2. Positive direct proof of the common purpose of rioters is not required, but the intent of the parties and the required community of action may be inferred from the circumstances and from the actions of the persons implicated. *State v. Miris*, 165.

EVIDENCE OF RIOT.

3. The evidence of the occurrences charged here is entirely satisfactory to a moral certainty that the defendants were rioters as claimed. *State v. Miris*, 165.

FAIR INSTRUCTION ON CONJUNCTIVE CONDUCT.

4. In a riot case an instruction that each of the defendants must have been "acting in conjunction with not less than two other persons in committing the act" is not open to the objection that it does not limit the "two other persons" to those implicated in the disturbance, where the court elsewhere charged that before any defendant could be convicted it must be found beyond a reasonable doubt, "not only that such defendant participated in the alleged riot, but that at least two of the other

persons whose names are stated in the indictment were present at the time the riot occurred, if one did occur, and were acting in concert with the defendant, and that they assembled with a common intent to do the act charged in said indictment." The apparent narrowness of the first charge disappears when the entire charge is considered.

State v. Mies, 165.

PUNISHMENT FOR RIOT.

5. Under Section 1914, B. & C. Comp., providing that if a felony or misdemeanor shall be committed in the course of a riot, any person participating therein shall be punished in the same manner as a principal in such felony or misdemeanor, and that any participant in such riot who shall carry a dangerous weapon, shall be punished by imprisonment in the penitentiary, every participant in a riot is liable to a penitentiary sentence if any one participant carries a dangerous weapon. In this case the defendant, though unarmed, was present aiding and encouraging others who were committing assaults with dangerous weapons, and was properly sentenced as though he had himself been armed and had committed an assault.

State v. Mies, 165.

RISK of Employment.

Assumption of by Employee—Familiarity with Methods—Remaining in Service With Knowledge. See **MASTER & SERVANT**, 4.

Insufficient Showing as to Assumption. See **MASTER & SERVANT**, 5.

RULES.

Duty to Make and Enforce—Complicated Work. See **MAST. & SERV. ?**.

RULES OF COURT.

APPEAL AND ERROR—BRIEFS—ASSIGNMENT OF ERROR.

Supreme Court Rule 32, subd. b. (35 Or. 605, requiring appellant to serve a brief containing a concise statement of the errors on which he relies, is satisfied by a substantial compliance therewith.

First National Bank v. Miller, 587.

RULES CONSTRUED.

Rule 32, subd. b. p. 587.

SALES.

SALE DISTINGUISHED FROM OTHER TRANSACTIONS.

1. Where property of a commingleable kind is left with a keeper of a warehouse under an agreement that the latter may use it and discharge his obligation to the depositor by paying cash or returning the same amount of the same grade of such property from some other source, such leaving is a sale, and the warehouse keeper is liable for the price of such property, even though the receipt provided for the payment of charges for storage and for the value of sacks used, and excused the warehouseman from liability for damages caused by the elements.

Savage v. Salem Mills Co. 1.

SALE OR AGENCY—NATURE OF CONTRACT.

2. A contract whereby defendant stipulated to sell its entire manufactured product to plaintiff as its sole agent in a territory mentioned, such product being designated in a schedule and list of prices, the contract providing that a schedule of such prices based on the present list should be made out showing the net price on each article of the entire line, the schedule remaining in force until such time as a new price list issued, a new schedule to be then made, "the schedule referred to to be attached (48th Or.—44)

and made a part of this contract," and "list prices to be low enough at all times to enable [plaintiff] to meet competition in the aforesaid territory," and a discount of 15 per cent from factory list prices to be allowed plaintiff, constituted a sale, and not an agency.

Heywood v. Doernbecher Manufacturing Co. 759.

RESCISSION BY PURCHASER—QUESTION FOR JURY.

3. It is for the jury to determine whether the conduct of the buyer was a refusal to comply with the terms of the contract, subjecting him to damages, or was such an abandonment of the contract as to justify the seller in rescinding it and forfeiting the payment already made.

Hanley v. Combs, 409.

COMPLETED ACT OF DELIVERY.

4. Under a contract of sale requiring the delivery of property at a stated time and place, the mere physical production of the property at the required place is not a compliance with the contract. The seller or his agent must attend to make the delivery and receive the purchase price.

Catlin v. Jones, 158.

PLACE OF DELIVERY.

5. An instruction imposing on a party to a contract in litigation a condition not included therein is so erroneous as to be reversible; as, instructing that the purchaser in a contract of sale is under obligation to accept the property at another place than the one named in the writing.

Hanley v. Combs, 409.

TENDER FOR DELIVERY.

6. Where, under a contract to sell a certain number of articles, the buyer was to satisfy himself as to the quality of those offered, evidence that about the time the purchaser began his inspection the seller arranged with a third person to let the purchaser select from his stock also, if necessary, in order to get the required number, is incompetent, in the absence of a showing that the purchaser knew of the arrangement, since it was not a transaction in which the buyer was concerned.

Hanley v. Combs, 409.

WAIVER OF OBJECTION TO PERFORMANCE OF CONTRACT.

7. A party to a contract should state any objections he may have at the time performance is tendered, and such objections as can then be made must be made or they will be considered waived.

Hanley v. Combs, 409.

SAME—CASE UNDER CONSIDERATION.

8. A contractor for the purchase of a stated number of articles who made no objection that the total number was not tendered him for examination, cannot afterward claim a breach of the contract because the seller did not offer for inspection the entire number he agreed to sell; that objection was waived by not making it at the time of the inspection.

Hanley v. Combs, 409.

IMPLIED WARRANTY.

9. In the case of a sale for a particular purpose, where the buyer has no opportunity to inspect, but relies upon the judgment of the seller, there is an implied warranty that the article sold shall be reasonably suitable for the purpose intended; but where a stated article is ordered, the only warranty is that the one furnished will be of the kind ordered, even though it is known to the seller that the buyer intends to use the article for a special purpose.

Mine Supply Co. v. Columbia Mining Co. 391.

SAME—CASE UNDER CONSIDERATION.

10. A dealer having contracted to sell a machine called a "latest improved Huntington mill" for reducing ores, does not impliedly warrant that such mill will successfully reduce the ores of the mine at which it is to be used, though the seller knew the mill was being bought for that purpose; but he does impliedly warrant that the mill delivered shall be just the kind ordered, and there is a breach of the contract if an old style mill is furnished instead of the "latest improved."

Mine Supply Co. v. Columbia Mining Co. 391.

REMEDIES OF SELLER—HOW RIGHT TO STOP MAY BE CLAIMED—MANNER OF ASSERTING RIGHT TO STOP IN TRANSIT.

11. No particular form is required in asserting the right of stoppage in transit, and it may be done by another at the request of the debtor, as well as by the debtor himself.

Frame v. Oregon Liquor Co. 272.

SAME—DURATION OF RIGHT TO STOP.

12. A seller on credit may resume possession of the goods while they are in the hands of a carrier or middleman in transit to the buyer, if the latter becomes insolvent; and this right continues until the delivery of the goods to the buyer or his agent, as against the right of seizure under legal process by creditors of the buyer.

Frame v. Oregon Liquor Co. 272.

SAME—CASE UNDER CONSIDERATION.

13. A seller having shipped goods to a buyer living back from a railroad, the buyer directed a forwarding teamster to receive such goods from the railroad company and store them until further orders. Before giving any further directions the buyer became insolvent, and the seller demanded possession, claiming the right to rescind the sale, no payment having been made, and to stop the goods in transit. Held, that the teamster was merely a forwarding agent, and that property in his hands con-

signed to such buyer was still in transit.

Frame v. Oregon Liquor Co. 272.

RIGHT OF RESCISSION BY SELLER FOR FAULT OF BUYER—RECOVERY OF MONEY PAID IN PART PERFORMANCE.

14. In general terms it may be stated that one who has paid money in part performance of a contract which he subsequently refuses to complete, the other party being willing to comply on his part, cannot recover the sum so paid, but it is a rule subject to very many exceptions and the particular facts will largely influence the decision. If, however, the subsequent refusal to perform does not go to the entire contract in effect, then the seller must perform and recoup his loss through an action for damages, or return the consideration.

Hanley v. Combs, 409.

SAME—CASE UNDER CONSIDERATION.

15. Where the purchaser of a number of articles agrees to determine their quality before delivery and acceptance, the mere refusal to pass articles offered which in fact were up to the required standard, if honestly done, is not such a substantial abandonment of the contract as to justify a rescission by the seller, whatever may be the liability of the purchaser in damages for violating his agreement to buy.

Hanley v. Combs, 409.

RIGHT OF SELLER TO RELY ON CONTRACT.

16. The provisions in a contract of sale for the benefit of the seller are available to him only when he has complied with the contract, and cannot be relied upon for his protection after he has failed in performance.

Mine Supply Co. v. Columbia Mining Co. 391.

RIGHTS OF BUYER—DELIVERY MUST BE IN DAYLIGHT.

17. Under a contract requiring the delivery at a stated time and place of articles requiring inspection and examination, the delivery must be made at such an hour as will permit the inspection to be made by daylight. This rule is particularly applicable to hops, owing to the variations between bales in both quality and condition. *Catlin v. Jones*, 158.

PAYMENT AND DELIVERY AS CONCURRENT ACTS.

18. Where a contract requires one party to sell and the other to purchase certain property at a specified price, the payment of the price and the delivery of the property are concurrent acts, and should be simultaneously performed. *Catlin v. Jones*, 158.

WILLINGNESS OF BUYER TO PERFORM—NEED OF TENDER.

19. Under a contract of sale making payment and delivery concurrent, the buyer cannot claim a default and damages against the seller unless he was able and willing to pay at the time and place appointed; but if he was so able and willing, neither tender nor demand is necessary to support an action for damages. *Catlin v. Jones*, 158.

WAIVER OF CLAIM OF DAMAGES FOR BREACH OF WARRANTY.

20. Retaining an article and endeavoring to use it, though it is not as contracted for, is not a waiver of a claim for damages for a breach of the contract of sale. *Mine Supply Co. v. Columbia Mining Co.* 391.

MEASURE OF DAMAGES FOR BREACH.

21. In action of damages by a purchaser against a seller for refusing to deliver the property contracted for, the measure of damages is the value of the property at the time of the refusal, less the agreed price to be paid with interest, which is here an element of damage.

Livesley v. Johnston, 40.

MEASURE OF DAMAGES FOR BREACH.

22. Where a seller delivers goods not of the kind or quality agreed upon, but they are accepted, the measure of the buyer's damages is the difference in value between the goods ordered and those delivered.

Mine Supply Co. v. Columbia Mining Co. 391.

BREACH OF WARRANTY—ELEMENTS OF DAMAGE.

23. In case of a breach of a contract to furnish a specified kind of mill for reducing ores, where the mill has been retained, the buyer may recover as damages the expense incurred in testing the mill, the freight paid on imperfect parts that were not used, the cost of providing new parts necessary to make the mill conform to the contract, if the seller refuses or neglects to furnish them, the value of gold lost while testing the machinery, and the amount of wages paid the employees while idle on account of the defective mill.

Mine Supply Co. v. Columbia Mining Co. 391.

SCHOOLS AND SCHOOL DISTRICTS.**CONSTITUTIONALITY OF STATUTE PRESCRIBING QUALIFICATION OF VOTER AT SCHOOL DISTRICT ELECTIONS.**

1. Section 3886, B. & C. Comp., providing that any citizen who has property in a school district on which he or she is liable to pay a tax shall be entitled to vote at any school district election, is not invalid as prescribing a property qualification in contravention of Const. Or. Art. II, § 2, defining the qualifications of voters, it not applying to school district elections. *Setterium v. Keene*, 520.

PROPERTY QUALIFICATION—CONSTRUCTION OF STATUTE.

2. Under B. & C. Comp. § 3386, providing that any citizen who has property in the district "as shown by the last county assessment * * on which he or she is Mable * * to pay a tax" shall be entitled to vote at any school district election, the voter must have property, the ownership of which must appear from the assessment alone.

Setterlin v. Keene, 520.

SPECIAL MEETINGS—PROOF OF POSTING NOTICES.

3. Under Section 3380, B. & C. Comp., relative to notices of school meetings, and Section 3395, relative to the duties of clerks of school districts, it is part of the official duty of a school clerk to post notices for special meetings, and his official record is sufficient evidence of what he did.

Amort v. School District, 522.

SCHOOL MEETINGS—AFFIDAVIT OF POSTING NOTICES.

4. Sections 538 and 539, B. & C. Comp., requiring proof of the service of a summons to be by affidavit, do not apply to the proof of posting notices of school meetings.

Amort v. School District, 522.

ADVERTISING FOR SUBSCRIPTIONS FOR INDEBTEDNESS.

5. The board of directors of a school district may advertise for subscriptions for the indebtedness of the district in such amounts as it may deem advisable.

Amort v. School District, 522.

RECORD EVIDENCE OF AMOUNT OF INDEBTEDNESS.

6. It is not necessary to the validity of an obligation of a school district that it appear by the records of the clerk that the indebtedness does not exceed the legal limit, that matter being determinable from the assessment.

Amort v. School District, 522.

SEEPAGE WATER.

Right to Control Under Statute. See **WATERS**, 12.

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Right to Prohibit Running of at Large. See **CONST. LAW**, 5.
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SLAUGHTERHOUSE.

- Right of Regulation Under Police Power. See **HEALTH**.
 Right to Cancel Permit to Conduct. See **CONST. LAW**, 7.
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SPECIAL PRIVILEGES OR IMMUNITIES.

- Local Option Law of 1905 is Constitutional. See **CONST. LAW**, 13-14.

SPECIFIC PERFORMANCE.**EVIDENCE OF MENTAL CONDITION.**

1. The mental condition of a party against whom specific performance of an oral contract to convey is sought is a circumstance to be considered as discrediting the transaction. *Sprague v. Jessup*, 211.

EVIDENCE CONSIDERED.

2. The evidence under consideration establishes a parol agreement, as claimed by plaintiffs. *Sprague v. Jessup*, 211.

CERTAINTY OF CONTRACT.

3. A parol contract must be clearly established in its terms and details before a court of equity will undertake to specifically enforce it. *Sprague v. Jessup*, 211.

EFFECT OF DENIAL OF CONTRACT BY DEFENDANT.

4. The mere denial of a contract by one against whom it is sought to be enforced will not prevent its specific performance if the court is satisfied of the terms of the agreement. *Sprague v. Jessup*, 211.

QUANTUM OF PROOF OF CONTRACT.

5. Before specific performance of an oral contract will be decreed, the terms thereof must be fully and satisfactorily shown to be certain and unambiguous. *Sprague v. Jessup*, 211.

GOOD FAITH AND DILIGENCE.

6. Where a contract for the purchase of hops to be grown required the purchaser to make certain advances "about April 1," and on March 28 he sent the money to the seller, but stopped payment of the checks on the 31st, claiming the payment to have been premature, yet expressing an intention to perform the contract, and on April 4 and on several occasions within the next six months offered to comply with his part of the contract, there was no laches or inequitable conduct barring a suit for specific performance. *Livesley v. Johnston*, 40.

DENIAL OF LIABILITY AS AFFECTING NEED OF TENDER.

7. Where the vendee in a contract for the sale of land has the right to pay any part of the consideration in commissions for selling other lands of the vendor, the vendor's denial of liability for the commissions earned by the vendee is equivalent to a refusal to execute a deed for the land specified, and hence the vendee is not obliged to make a tender of the balance as a condition precedent to a suit for specific performance.

Guillaume v. K. S. D. Land Co. 400.

NECESSITY AND SUFFICIENCY OF TENDER.

8. Where the vendee in a contract for the sale of land has deposited in court the money tendered, his withdrawal of the same before trial precludes a decree for specific performance in his favor, unless some act of the vendor relieves the vendee from the necessity of a tender.

Guillaume v. K. S. D. Land Co. 400.

SUFFICIENCY OF DESCRIPTION IN CONTRACT.

9. A contract for the sale of land referring to it as a certain block, as

designated on a map on file in the vendor's office, and possession being delivered to the purchaser, is sufficiently definite to enable a surveyor to locate on the ground the block as surveyed, though the plat was not recorded, and hence is sufficient to sustain a decree for specific performance. *Guillaume v. K. S. D. Land Co.* 400.

ALTERNATIVE RELIEF OF DAMAGES.

10. Where the defendants in a suit for the specific performance of a contract of sale dispose of the property during the pendency of the suit, equity may retain jurisdiction and award the plaintiff damages in lieu of the article contracted to be delivered. *Livesley v. Johnston*, 40.

DAMAGES AWARDED IN LIEU OF SPECIFIC PERFORMANCE—PROCEEDINGS AND RELIEF.

11. Where damages are awarded in place of a decree for specific performance of a contract to sell, the proper amount is what plaintiff would have been entitled to in a law action for damages for breaching the contract. *Livesley v. Johnston*, 40.

STATUTE OF FRAUDS—POSSESSION AS PART PERFORMANCE.

12. Possession of real property by the purchaser under a verbal contract, in connection with payment of part of the purchase price and a tender of the balance, is such a part performance of the contract as to avoid the statute of frauds and support a decree for specific performance. *Sprague v. Jessup*, 211.

STATUTE OF FRAUDS—CHANGE OF POSSESSION BY COTENANT AS PART PERFORMANCE OF ORAL CONTRACT.

13. Where a cotenant with a part owner of real property claims specific performance of an oral contract of purchase with another owner the proof must be clear that possession was taken under the oral agreement to constitute such a part performance as to avoid the statute of frauds. *Roberts v. Templeton*, 65.

CONTRACT TO LEASE—STATUTE OF FRAUDS—PART PERFORMANCE.

14. The part performance of a contract that will avoid the effect of the statute of frauds must be an act done in pursuance of the contract and referable to it solely as an actuating cause; a collateral act done in reliance on the contract, however prejudicial, is not enough. *Jenning v. Miller*, 201.

SAME—CASE UNDER CONSIDERATION.

15. A tenant who had secured an option on another store in anticipation of having his tenancy terminated by the expiration of his lease, and afterward orally agreed with the landlord for a continuation of the former lease for three years, cannot claim that his forfeiture of the option and his continued occupation of the old store were part performance of the oral agreement, even though he is not able to obtain any location when the landlord repudiates such agreement, since neither act is in execution of the oral lease solely, the continued occupation being referable to the old lease and the forfeiting of the option being wholly collateral. *Jenning v. Miller*, 201.

STATUTE OF FRAUDS—CANCELING DEED—INTEREST OF PLAINTIFF.

16. Where an agreement between a client and his attorney, providing that the latter should prosecute a suit to remove a cloud from the title to certain land and receive one-half the land as his compensation in case the suit was successful, rested in parol, and the attorney never had possession of the land, he could not, in view of B. & C. Comp. § 793, requiring conveyances to be in writing, maintain a suit to set aside a deed from his client to the defendant in the original suit. *Jackson v. Stearns*, 25.

SPRING.

Right by Statute to Water of Small Spring. See **WATERS**, 12.

STATE LAND BOARD.

Deeds of Not Open to Collateral Attack. See **PUBLIC LANDS**, 5.

Limit of Acreage Permitted in One Deed. See **PUBLIC LANDS**, 10.

STATES.**RIGHT OF STATE TO SUE—INTEREST OF PLAINTIFF.**

1. A state, as well as an individual, must show some interest in the subject of litigation to be entitled to recognition by the courts.

Oregon v. Warner Stock Co. 378.

SAME—CASE UNDER CONSIDERATION.

2. A state cannot maintain a suit to determine that persons claiming lands within its borders under the laws of the United States are entitled thereto against other persons claiming under the state laws, without showing some present interest in the land.

Oregon v. Warner Stock Co. 378.

SAME—CASE UNDER CONSIDERATION.

3. A state cannot maintain a suit to cancel its patent to lands within its borders without showing some present interest in such lands.

Oregon v. Warner Stock Co. 378.

SAME—COMPLAINT—SUFFICIENCY.

4. A complaint in a suit by a state, praying for a decree adjudging that persons who have settled on and claimed land under the pre-emption, homestead or timber culture laws are entitled thereto, in which it is alleged that the persons settled on vacant unsurveyed public lands, not swamp nor selected as swamp lands, nor otherwise reserved, with intent to acquire title under the pre-emption, homestead or timber culture laws, and that they filed on the lands under the federal laws, does not show any interest in the state in the lands essential to enable it to maintain the suit.

Oregon v. Warner Stock Co. 378.

STATION GROUNDS.

What Space is Comprised in Station Grounds. See **RAILROADS**, 3.

Effect of Designation by Railroad Company. See **RAILROADS**, 4.

STATUTE OF FRAUDS.**CHANGE OF POSSESSION BY COTENANT AS PART PERFORMANCE OF ORAL CONTRACT TO SELL.**

1. Where a cotenant with a part owner of real property claims specific performance of an oral contract of purchase with another owner the proof must be clear that possession was taken under the oral agreement to constitute such a part performance as to avoid the statute of frauds.

Roberts v. Templeton, 65.

SAME—CASE UNDER CONSIDERATION.

2. Where plaintiff, up to the time of his oral purchase of the interest of a tenant in common in a mine, was in possession under a contract with a cotenant of the vendor, so that his prior possession merged into that under his purchase, there was not such a change of possession under the contract as to take it out of the statute of frauds.

Roberts v. Templeton, 65.

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Jenning v. Miller, 201.

STATUTE OF LIMITATIONS. Same as **LIMITATION OF ACTIONS.**

STATUTES.

TITLE OF INITIATIVE ACT MUST EXPRESS SUBJECT.

1. The validity of laws adopted at the polls pursuant to an initiative petition, under Const. Or. Art. IV, § 1, must be tested by the constitution like legislative laws, and such laws are subject to the requirement of Const. Or. Art. IV, § 20, as to subjects and title.

State ex rel. v. Richardson, 309.

SUFFICIENCY OF TITLE OF LOCAL OPTION ACT.

2. The title of the local option law adopted by the people at the polls (Laws 1905, pp. 41, 47, c. 2) fairly expresses the subject of the act and sufficiently indicates the additional matters therewith connected, as required by Const. Or. Art. IV, § 20.

State ex rel. v. Richardson, 309.

IMPLIED REPEAL.

3. The enactment of a law imposing a new penalty for an offense described by an existing statute, and not repealing the old law, will operate prospectively only, leaving the former in force as to acts committed prior to the time the new law goes into effect.

Portland v. Cook, 550.

SAME—CASE UNDER CONSIDERATION.

4. An ordinance or statute forbidding certain acts is not retroactively affected by a subsequent enactment permitting certain persons to perform such acts, and not in any way referring to the first law, for the latter is prospective only and even the beneficiaries of the second enactment may be prosecuted for violating the first law before the second was passed.

Portland v. Cook, 550.

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TAILINGS.

Enjoining Depositing of Debris on Farm. See MINES, 1.

TAXATION.

LICENSES AND TAX DISTINGUISHED.

1. A tax is a charge imposed upon persons or property by government, while a license is a charge for a privilege.

Reser v. Umatilla County, 326.

CONSTITUTIONAL LAW—UNIFORMITY OF TAXATION—SHEEP LAW.

2. A law imposing on each sheep brought within a state a charge so great as to be obviously not a license fee, and under such conditions that the charge is against the property and not against the sheep owner or the business of sheep raising, is a revenue measure imposing a tax, and unconstitutional because the tax is not levied according to the value of each piece of property assessed, thereby producing unequal and ununiform taxation in violation of Const. Or. Art. IX, § 1.

Reser v. Umatilla County, 326.

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TECHNICAL OBJECTION.

Degree of Exactness Required in Such Instances. See TRIAL, 2.

TELEGRAPHS AND TELEPHONES.

DUTY TO MAKE RULES FOR HANGING CABLES.

1. The work of hanging telephone cables on poles by ropes and hooks with a block and tackle is so simple and the proper use of all the appliances is so apparent that no rules are necessary for the government of those so engaged.

Blust v. Pacific Telephone Co., 34.

ASSUMPTION OF KNOWN RISK IN HANGING CABLES

2. An experienced lineman, familiar with the methods and appliances usually used in stringing wires and cables on poles, who returns to work and continues with an employer without objection to the method in use, assumes the risk of that manner of doing the work.

Blust v. Pacific Telephone Co., 34.

TENANCY IN COMMON.

CHANGE OF POSSESSION AS PART PERFORMANCE OF CONTRACT TO BUY.

Where plaintiff, up to the time of his oral purchase of the interest of a tenant in common in a mine, was in possession under a contract with a cotenant of the vendor, so that his prior possession merged into that under his purchase, there was not such a change of possession under the contract as to take it out of the statute of frauds.

Roberts v. Templeton, 65.

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Sufficiency of Title of Local Option Act of 1905. See STATUTES, 2.

TORTS.

LIABILITY OF JOINT WRONGDOERS.

1. An action for tort may be brought against the wrongdoers, either jointly or severally, independent of contract.

Strauhal v. Asiatic Steamship Co. 100.

SAME—CASE UNDER CONSIDERATION.

2. To make tort feasons liable jointly, there must be some sort of community in the wrongdoing, and the injury must be in some way due to their joint work; but it is not necessary that they be acting together or in concert, if their concurring negligence occasions the injury.

Strauhal v. Asiatic Steamship Co. 100.

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Computation of Time for Filing. See APPEAL, 7, 8.

TREE CULTURE CLAIM.

Rights of Administrator of Deceased Claimant. See PUBLIC LANDS, 1.

TRIAL.

STRIKING OUT EVIDENCE.

1. Ordinarily it is not reversible error to refuse to strike out evidence, though improper, unless it was properly and seasonably objected to.

State v. Mizis, 165.

DEFINITENESS OF TECHNICAL OBJECTIONS.

2. What may be termed technical objections to evidence should always be specific, in justice to the adversary and the court. *State v. Mizis*, 165.

INSTRUCTIONS CONSIDERED AS A WHOLE.

3. The instruction on a given point in a charge must be read with the balance of the instructions. *State v. Mizis*, 165.

INSTRUCTIONS—UNDUE EMPHASIS.

4. The use of the word "important" in referring to certain matters proper for the consideration of a jury will not be considered as placing undue stress on those matters where the word is used several times, and in the instructions submitted for both parties.

Baker County v. Huntington, 593.

NEED OF ASKING PARTICULAR INSTRUCTIONS.

5. Where particular instructions are desired on special points, they must be requested or error cannot be assigned on the failure to so charge.

Baker County v. Huntington, 593.

ASKING SPECIAL CHARGES.

6. If particular limitations or reservations on a matter are desired they should be requested. *Baker County v. Huntington*, 593.

TROVER AND CONVERSION.

PLEADING IN TROVER—ALLEGATIONS AND PROOFS UNDER DENIAL.

1. Where, in an action for conversion, the defense was that the goods were the property of a debtor of defendant and had been attached and sold, it was competent for plaintiff to show that the goods which had been sold to the debtor had never been delivered to him, but were in

transit at the time defendant obtained possession, and that subsequently the seller exercised the right to stop the goods in transit and annul the sale, without especially pleading such facts, they being admissible under a denial of the attachment and sale as tending to show that the property did not belong to the debtor when seized.

Frame v. Oregon Liquor Co. 272.

TROVER AND CONVERSION—EVIDENCE—ADMISSIBILITY.

2. Where, in an action for conversion, it was shown that the goods had been bought by a third person, and placed in plaintiff's possession charged with the duty of forwarding them to the third person when ordered and that defendant, a creditor of the third person, had obtained possession of them from the plaintiff by a trick and without authority, evidence that the seller had demanded possession from plaintiff was admissible as showing that he had exercised the right of stoppage in transitu and that plaintiff had been compelled to settle for the goods.

Frame v. Oregon Liquor Co. 272.

SUFFICIENCY OF COMPLAINT.

3. In an action of trover it is sufficient to allege the ownership of the property and the right to its possession, together with the fact of conversion by defendant, and the damage, without particularly stating the acts constituting the conversion or the means of their accomplishment.

Austin v. Vanderbilt, 206.

SUFFICIENCY OF COMPLAINT.

4. In trover, a complaint, alleging that plaintiff was the owner and in possession of the property and entitled to such possession at the time of the conversion, is sufficient, and an additional allegation that the possession was as a mortgagee does not render the complaint objectionable on the ground that it states a mere conclusion. It is not necessary to set out the mortgage either in *hæc verba*, or in substance or legal effect.

Harvey v. Lidvall, 558.

EFFECT OF POSSESSION BY PLAINTIFF.

5. In trover a showing of possession by the plaintiff establishes his case against a motion for an involuntary nonsuit.

Harvey v. Lidvall, 558.

TENDER OF DEBT AFTER CONVERSION.

6. Where a pledge has been converted by the pledgee and cannot be returned, the pledgor need not tender the amount of the debt secured as a condition of bringing an action for conversion.

Austin v. Vanderbilt, 206.

MEASURE OF DAMAGES—COMPETENT EVIDENCE.

7. The value of property at the time of its conversion is the measure of damages in trover, but evidence as to the value a reasonable time before and after that date is competent.

Austin v. Vanderbilt, 206.

TRUSTS.

EQUITABLE CONTROL—MONEY HAD AND RECEIVED.

1. One holding the legal title to land under a promise to sell and make a given disposition of the proceeds is subject to two alternatives; he can be compelled to sell if he refuses to do so upon the offering of a reasonable price, or, if he sells, the parties entitled to the proceeds may sue for their proportions as for money had to their use.

Hamilton v. Holmes, 453.

ACCOUNTING—EFFECT OF EVIDENCE.

2. The evidence affirmatively shows that the trustees fully accounted to Fred Nodine in writing for the property transferred to them, and that

they did not have in their hands sufficient funds arising from the trust property to have prevented the sales of the real property of Nodine under the executions on which it was sold. *Nodine v. Richmond*, 527.

ACCOUNTING—EVIDENCE OF FRAUD.

3. The evidence entirely fails to show any fraud or conspiracy between the trustees and the creditors of Fred Nodine, or any of them, to injure his interests or advance their own. *Nodine v. Richmond*, 527.

SALES—EVIDENCE OF COLLUSION.

4. The evidence does not show that W. T. Wright colluded with various parties to purchase for his secret benefit part of the Fred Nodine land that had been transferred to him as trustee. *Nodine v. Richmond*, 527.

UNITED STATES COMMISSIONERS.

COMMISSIONER AS SURETY ON AN APPEAL BOND.

A United States commissioner is an officer of a court, under the laws of the United States, and therefore disqualified to become a surety on an appeal bond, under B. & C. Comp. §§ 1507 and 549, subd. 3.

Paxton v. Lively, 135.

UNITED STATES CONSTITUTION. Same as CONSTITUTION OF THE UNITED STATES.

UNITED STATES STATUTES. Same as STATUTES OF THE UNITED STATES.

VACATING DEFAULT.

Order Setting Aside Default Not Final. See APPEAL, 3.

VENDOR AND PURCHASER.

EFFECT AND CONSTRUCTION OF CONTRACT.

1. A bond for a deed confers on the obligee an equitable interest in the property, and a court of equity will seldom grant a strict foreclosure, but will allow a reasonable time for payment. *Higinbotham v. Frock*, 129.

SAME—CONSTRUCTION OF CONTRACT.

2. A written proposal to plaintiff from a corporation owning lands, to sell him a certain block for a specified sum, to be paid for in cash or in commissions "on sales" effected by plaintiff, "it is all to be paid for in either cash or commissions within three years from the date hereof, * * you to obtain purchasers for such of our lands as we place at your disposal * * this agreement to sell to others, except yourself, to remain in force for 12 months," is unambiguous, and not susceptible of the construction that plaintiff was required to sell all the corporation's land in order to entitle him to a deed of the block in question.

Guillaume v. K. S. D. Land Co. 401.

SAME—CONSTRUCTION OF CONTRACT.

3. A writing by which an owner of land agrees to sell it to a stated person by a fixed date is a mere offer to sell, and may be withdrawn by the vendor at any time before it is accepted. *Sprague v. Schotte*, 609.

RESCISSION BY VENDOR—ABILITY TO PERFORM.

4. A vendor of real property desiring to claim a forfeit deposited by the other party to a contract for the sale of such property, must show that he is prepared to perform on his side, notwithstanding the purchaser refused compliance before the time for completing the transfer.

Wells v. Page, 74.

RESCISSION—ABILITY OF VENDOR TO PERFORM.

5. A vendor in a contract to convey on payment of the purchase price cannot declare a forfeiture for failure of the purchaser to pay so long as he is himself unable to perform by tendering such a title as the contract requires. *Higinbotham v. Frock, 129.*

SAME—NEED OF TENDER.

6. A vendor of real property, who is prepared to carry out his part of the contract, need not tender a deed or make an offer to perform, before suing the vendee for a breach of his contract to purchase, after the latter has repudiated the agreement. *Wells v. Page, 74.*

SAME—BOND FOR DEED—NOTICE REQUIRED.

7. Under a bond for a deed providing that in case of default in any stipulated payment, the vendor may declare the bond void and repossess himself of the premises, the vendor may cancel the contract upon reasonable notice because of the vendee's default, but such a contract is not self executing, and cannot be summarily terminated by the vendor. *Higinbotham v. Frock, 129.*

SAME—FAILURE TO PAY—TENDERING DEED.

8. In a case where time is not made a vital feature of the contract, a purchaser who has entered into possession of land under an agreement to buy is not in default, so as to forfeit his right to occupation, by a failure to make the final payment, when the vendor has not tendered a deed. *Coles v. Meskimen, 54.*

SAME—RIGHT TO FORFEIT.

9. In a suit to cancel a bond for a deed for the fault of the obligee, equity will not declare a forfeiture. *Higinbotham v. Frock, 129.*

ACTION FOR BREACH—MEASURE OF DAMAGES.

10. The measure of damages for a refusal by a vendor to convey under his contract is the value of the property at the time of the breach, less liens which the purchaser has allowed to accrue thereon. *Jennings v. Oregon Land Co. 287.*

SAME—CASE UNDER CONSIDERATION.

11. A land owner agreed to convey several lots to a hotel manager, in consideration of having a hotel erected thereon within a stated time. This was done, though several liens were in force against it, but the owner refused to convey. In an action of damages for such refusal the measure of recovery is the value of the land with its improvements at the date of the breach, less the sum of the accrued liens, and not the land plus the cost of the labor and material. *Jennings v. Oregon Land Co. 287.*

ACTION FOR BREACH—COMPETENCY OF EVIDENCE.

12. In order to enable a jury to estimate the value of a building that has no market value, owing to its location and size, and to test the value of opinion evidence on the subject, it is competent to present to the jury the items and expense of construction. *Jennings v. Oregon Land Co. 287.*

VENUE.

Discretion as to Changing in Criminal Trials. See CRIM. LAW, 1.

VERDICT.

Curative Effect of on Defective Pleading. See PLEADINGS, 17, 18.

Right of Supreme Court to Reduce if Excessive. See APPEAL, 36. (48th Or.—45)

SPRING.

Right by Statute to Water of Small Spring. See **WATERS**, 12.

STATE LAND BOARD.

Deeds of Not Open to Collateral Attack. See **PUBLIC LANDS**, 5.

Limit of Acreage Permitted in One Deed. See **PUBLIC LANDS**, 10.

STATES.**RIGHT OF STATE TO SUE—INTEREST OF PLAINTIFF.**

1. A state, as well as an individual, must show some interest in the subject of litigation to be entitled to recognition by the courts.

Oregon v. Warner Stock Co. 378.

SAME—CASE UNDER CONSIDERATION.

2. A state cannot maintain a suit to determine that persons claiming lands within its borders under the laws of the United States are entitled thereto against other persons claiming under the state laws, without showing some present interest in the land.

Oregon v. Warner Stock Co. 378.

SAME—CASE UNDER CONSIDERATION.

3. A state cannot maintain a suit to cancel its patent to lands within its borders without showing some present interest in such lands.

Oregon v. Warner Stock Co. 378.

SAME—COMPLAINT—SUFFICIENCY.

4. A complaint in a suit by a state, praying for a decree adjudging that persons who have settled on and claimed land under the pre-emption, homestead or timber culture laws are entitled thereto, in which it is alleged that the persons settled on vacant unsurveyed public lands, not swamp nor selected as swamp lands, nor otherwise reserved, with intent to acquire title under the pre-emption, homestead or timber culture laws, and that they filed on the lands under the federal laws, does not show any interest in the state in the lands essential to enable it to maintain the suit.

Oregon v. Warner Stock Co. 378.

STATION GROUNDS.

What Space is Comprised in Station Grounds. See **RAILROADS**, 3.

Effect of Designation by Railroad Company. See **RAILROADS**, 4.

STATUTE OF FRAUDS.**CHANGE OF POSSESSION BY COTENANT AS PART PERFORMANCE OF ORAL CONTRACT TO SELL.**

1. Where a cotenant with a part owner of real property claims specific performance of an oral contract of purchase with another owner the proof must be clear that possession was taken under the oral agreement to constitute such a part performance as to avoid the statute of frauds.

Roberts v. Templeton, 65.

SAME—CASE UNDER CONSIDERATION.

2. Where plaintiff, up to the time of his oral purchase of the interest of a tenant in common in a mine, was in possession under a contract with a cotenant of the vendor, so that his prior possession merged into that under his purchase, there was not such a change of possession under the contract as to take it out of the statute of frauds.

Roberts v. Templeton, 65.

POSSESSION AS PART PERFORMANCE.

3. Possession of real property by the purchaser under a verbal contract, in connection with payment of part of the purchase price and a

tender of the balance, is such a part performance of the contract as to avoid the statute of frauds and support a decree for specific performance.
Sprague v. Jessup, 211.

CONTRACT TO LEASE—ACTS CONSTITUTING PART PERFORMANCE.

4. The part performance of a contract that will avoid the effect of the statute of frauds must be an act done in pursuance of the contract and referable to it solely as an actuating cause; a collateral act done in reliance on the contract, however prejudicial, is not enough.

Jenning v. Miller, 201.

SAME—CASE UNDER CONSIDERATION.

5. A tenant who had secured an option on another store in anticipation of having his tenancy terminated by the expiration of his lease, and afterward orally agreed with the landlord for a continuation of the former lease for three years, cannot claim that his forfeiture of the option and his continued occupation of the old store were part performance of the oral agreement, even though he is not able to obtain any location when the landlord repudiates such agreement, since neither act is in execution of the oral lease solely, the continued occupation being referable to the old lease and the forfeiting of the option being wholly collateral.

Jenning v. Miller, 201.

STATUTE OF LIMITATIONS. Same as LIMITATION OF ACTIONS.

STATUTES.

TITLE OF INITIATIVE ACT MUST EXPRESS SUBJECT.

1. The validity of laws adopted at the polls pursuant to an initiative petition, under Const. Or. Art. IV, § 1, must be tested by the constitution like legislative laws, and such laws are subject to the requirement of Const. Or. Art. IV, § 20, as to subjects and title.

State ex rel. v. Richardson, 309.

SUFFICIENCY OF TITLE OF LOCAL OPTION ACT.

2. The title of the local option law adopted by the people at the polls (*Laws 1905*, pp. 41, 47, c. 2) fairly expresses the subject of the act and sufficiently indicates the additional matters therewith connected, as required by Const. Or. Art. IV, § 20.

State ex rel. v. Richardson, 309.

IMPLIED REPEAL.

3. The enactment of a law imposing a new penalty for an offense described by an existing statute, and not repealing the old law, will operate prospectively only, leaving the former in force as to acts committed prior to the time the new law goes into effect.

Portland v. Cook, 550.

SAME—CASE UNDER CONSIDERATION.

4. An ordinance or statute forbidding certain acts is not retroactively affected by a subsequent enactment permitting certain persons to perform such acts, and not in any way referring to the first law, for the latter is prospective only and even the beneficiaries of the second enactment may be prosecuted for violating the first law before the second was passed.

Portland v. Cook, 550.

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APPROPRIATION—ENJOINING UNINJURIOUS DIVERSION.

15. An appropriator is not entitled to enjoin the use by subsequent appropriators of water that he cannot use, either because the stream carries more than his appropriation or because it carries so little as to be useless to him—in either case the original claimant is uninjured.

Mann v. Parker, 321.

VALIDITY OF APPROPRIATION FROM DITCH—EFFECT OF SEIZURE.

16. A valid appropriation of water may be made by diverting it from an artificial waterway if the owner thereof consents; but a seizure of water from another's ditch cannot be the foundation of an appropriation.

MacRae v. Small, 139.

EVIDENCE OF RELINQUISHMENT OF WATER RIGHT.

17. The evidence shows that the defendant did not intend to relinquish an appropriation made by his predecessor in interest.

MacRae v. Small, 139.

EVIDENCE OF ADVERSE USE OF WATER.

18. The evidence does not show that the defendant's water rights were lost by adverse use by another, as such use was not exclusive of plaintiff's use.

MacRae v. Small, 139.

ADVERSE USE—KIND OF EVIDENCE REQUIRED.

19. The evidence of adverse use required to deprive an appropriator of his vested right to the use of water must be clear and convincing.

MacRae v. Small, 139.

DEBRIS—DAM AS NUISANCE—INJUNCTION.

20. Where a dam erected by a lower riparian proprietor backs water and mining debris onto the ground of an upper proprietor, who possesses the superior right to the use of the water, and prevents the debris discharged into the stream by the upper proprietor from being carried away, thereby interfering with the operation of the mine, the upper proprietor is entitled to have the maintenance of the dam enjoined as a private nuisance.

Kane v. Littlefield, 299.

WITNESSES.**IMPEACHMENT—PARTICULAR WRONGFUL ACTS.**

1. Under B. & C. Comp. § 852, providing that a witness may not be impeached by evidence of particular wrongful acts, testimony regarding the desertion of certain witnesses from a ship is inadmissible.

State v. White, 416.

RIGHT TO IMPEACH ONE'S OWN WITNESS.

2. Under Section 850, B. & C. Comp., a party may impeach his own witness by showing that on previous occasions the witness has made statements inconsistent with his present testimony, in order to offset any unfavorable effect of the present statements.

State v. Jennings, 483.

CONTRADICTING WITNESS BY PREVIOUS WRITTEN STATEMENT.

3. Where a witness denies the correctness of a writing purporting to contain a previous statement at variance with his present testimony, the impeaching evidence is not limited to the writing, but oral evidence may be received of what the witness actually said.

State v. Jennings, 483.

PROPRIETY OF DISCHARGING CODEFENDANTS TO TESTIFY FOR DEFENDANT.

4. The court exercised its discretion wisely in declining to discharge the codefendants under Section 1397, B. & C. Comp., that they might become witnesses for the defendant, since there was sufficient testimony to justify bringing them both to trial.

State v. White, 416.

WORDS AND PHRASES.

"ADOPTED" as Applied to Report of Viewers.

Under a statute directing that the report of viewers appointed to lay out a proposed county road shall be "adopted" by the county court, an order that the report be "approved" is sufficient, as the two words are practically synonyms. *Miller v. Union County*, 266.

"APPROVED" is same in sense as "adopted."

Miller v. Union County, 266.

"IMPLIED CONTRACT" in Attachment Law.

The legal liability to repay money paid on a contract which the vendor refuses to complete is an implied contract for the direct payment of money, within the meaning of that phrase as used in B. & C. Comp. § 296, subd. 1.

Hanley v. Combs, 409.

"LICENSE" is a Charge for a Privilege. *Resser v. Umatilla County*, 326.

"MANUFACTURING."

Using water to create a mill pond for running a sawmill and flour mill is using it for "manufacturing purposes," within the meaning of the act of Congress of July 26, 1866, now Rev. Stat. U. S. § 2339.

Parkersville Drainage District v. Wattier, 322.

"PARTY."

The next friend of an incompetent litigant is a "party" to the litigation in which he appears. *Owings v. Turner*, 462.

WRIT OF REVIEW.

FORM OF PETITION—ATTACHING EXHIBITS.

1. In view of the provision of Section 596, B. & C. Comp., that a petition for a writ of review shall describe with convenient certainty the determination sought to be reviewed, the petition should state such matters as are necessary, and copies of the record objected to should not be attached as exhibits—all that matter, and the expense of providing it, being provided for by Sections 598 and 599 of the Code.

Gaston v. Portland, 82.

PLEADING PROPER FOR DEFENSE.

2. Under the practice in Oregon concerning writs of review as defined by Section 603, B. & C. Comp., requiring the court issuing the writ to affirm, reverse, modify or annul the decision reviewed, or to direct the inferior tribunal to proceed in a designated manner, the only pleading on the part of the defendants is a return to the writ, and it is not proper practice to file a demurrer to the petition or a motion to quash or dismiss. All objections and defenses should be presented in the form of a return to the writ, and the allegations of the petition are to be deemed true if the answer raises questions that would ordinarily be presented by a motion or demurrer.

Gaston v. Portland, 82.

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